35A Am. Jur. 2d Food Summary

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Food
George L. Blum, J.D.

Correlation Table

Summary

Scope:
This article deals with the validity, construction, application, and enforcement of statutes, ordinances, and regulations affecting the production, distribution, and sale of food for the purposes of protecting the public health by insuring pure, wholesome, and nutritious food and of preventing fraud and deception of the public by such means as the establishment of standards of purity and quality.

Federal Aspects:
This article reviews the major federal statutes concerned with the purity, preparation, and labeling of food.

Treated Elsewhere:
Agricultural laws, see Am. Jur. 2d, Agriculture §§ 1 to 58

Drugs and controlled substances, regulation of, see Am. Jur. 2d, Drugs and Controlled Substances §§ 19 to 140

False advertising of food, drugs, or cosmetics as prohibited by the Federal Trade Commission Act, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1094 to 1099

Packers and Stockyards Act (regulating stockyard owners, market agencies, and dealers engaged in the business of furnishing stockyard services or in the business of buying or selling livestock), see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 256, 257

Res ipsa loquitur doctrine as applied to containers of food or drink that contain foreign substances, see Am. Jur. 2d, Products Liability § 502

Seller's duty of care as to food, beverages, and products sold in bottles or containers, see Am. Jur. 2d, Products Liability §§ 276 to 278

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I. Overview

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Research References

West's Key Number Digest

West's Key Number Digest, Food 0.5

A.L.R. Library

A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
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I. Overview

§ 1. “Food” defined

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West’s Key Number Digest

West’s Key Number Digest, Food 0.5

The word “food” is a general term that applies to all that is eaten to nourish the body.[1] The Federal Food, Drug, and Cosmetic Act defines food as (1) articles used for food or drink for human beings or other animals, (2) chewing gum, and (3) articles used for components of any such article.[2]

The term includes frog legs,[3] frozen egg yolks,[4] cheese,[5] syrup,[6] sausage,[7] cream of tartar,[8] coffee grounds,[9] candy, sweetmeats, preserves, and other confectionery,[10] corn meal, poppy seeds, caraway seeds, and corn grits,[11] and oleo oil.[12] Manufactured ready-to-eat smoked and cured fishery products constituted “food” as defined by the FDCA.[13]

The term “food” does not include tobacco[14] or wine.[15] Moreover, water is not a food within the meaning of one state’s food law.[16]

Footnotes

1 Pollock v. City of Mansfield, 71 So. 2d 706 (La. Ct. App. 2d Cir. 1954); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912); Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

2 21 U.S.C.A. § 321(f).

3 U.S. v. 76,552 Pounds of Frog Legs, 423 F. Supp. 329 (S.D. Tex. 1976).

4 U.S. v. 1,200 Cans Pasteurized Whole Eggs by Frigid Food Products, Inc.—Detroit, Mich., 339 F. Supp. 131 (N.D. Ga. 1972).

5 U.S. v. Union Cheese Co., 902 F. Supp. 778 (N.D. Ohio 1995).

6 McDermott v. State, 143 Wis. 18, 126 N.W. 888 (1910), rev’d on other grounds, 228 U.S. 115, 33 S. Ct. 431, 57 L. Ed. 754 (1913).

7 Armour & Co. v. Bird, 159 Mich. 1, 123 N.W. 580 (1909).

8 State Board of Pharmacy v. Gasau, 195 N.Y. 197, 88 N.E. 55 (1909).

9 Harkey v. State, 90 Tex. Crim. 212, 234 S.W. 221, 17 A.L.R. 1276 (1921) (coffee grounds intended to be reused in making coffee are within the ambit of a statute punishing anyone who mingles any noxious substance with any drink, food, or medicine, with the intent to kill or injure any other person).

10 Crackerjack Co. v. City of Chicago, 330 Ill. 320, 161 N.E. 479, 58 A.L.R. 287 (1928); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).

11 U.S. v. H. B. Gregory Co., 502 F.2d 700 (7th Cir. 1974).

12 Pittsburgh Melting Co v. Totten, 248 U.S. 1, 39 S. Ct. 3, 63 L. Ed. 97 (1918).

13 U.S. v. N.Y. Fish, Inc., 10 F. Supp. 3d 355 (E.D. N.Y. 2014).

14 Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

15 Commonwealth v. Kebort, 212 Pa. 289, 61 A. 895 (1905).

16 Sheffer v. City of Harrisburg, 60 Pa. D. & C.2d 725, 1971 WL 14578 (C.P. 1971).

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I. Overview

§ 2. “Food” distinguished from “drugs”

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West’s Key Number Digest

West’s Key Number Digest, Food 0.5

In determining whether a product is a food or a drug, the Food and Drug Administration may consider the manufacturers’ subjective intent as well as the actual therapeutic intent based upon objective evidence.[1] For an article to be a “food for special dietary use,” and not subject to regulation as a “drug” under the Food, Drug, and Cosmetic Act,[2] it must be “intended for ingestion.”[3]

A dietary supplement addressing the special dietary needs of persons with high cholesterol content is a “special dietary food” for the purposes of federal regulation,[4] but a nasally administered vitamin preparation is not.[5] The Food and Drug Administration (FDA) could regulate a supplement as a drug.[6] However, artificially produced 1,3-dimethylamylamine (DMAA) for use in fitness products aimed at bodybuilders and other athletes was not an “herb or other botanical” or a concentrate, metabolite, constituent, extract, or combination of an herb or other botanical, and, therefore, was not a “dietary supplement” protected by Dietary Supplement Health and Education Act (DSHEA) provision restricting the ability of the Food and Drug Administration (FDA) to condemn dietary supplements as adulterated, even though the DMAA appeared in geraniums in trace amounts.[7]

”Starchblockers” are a “drug,” not a “food,” for purposes of the Food, Drug, and Cosmetic Act.[8]

Footnotes

1 U.S. v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039, 791 F. Supp. 751 (C.D. Ill. 1991), judgment aff’d, 984 F.2d 814 (7th Cir. 1993); Nutrilab, Inc. v. Schweiker, 547 F. Supp. 880 (N.D. Ill. 1982), judgment aff’d, 713 F.2d 335 (7th Cir. 1983).
As to the regulation of drugs, generally, see Am. Jur. 2d, Drugs and Controlled Substances §§ 19 to 140.

2 21 U.S.C.A. §§ 301 to 399i.

3 U.S. v. Ten Cartons, Ener-B Nasal Gel, 888 F. Supp. 381 (E.D. N.Y. 1995), judgment aff’d, 72 F.3d 285 (2d Cir.

1995) and (rejected on other grounds by, U.S. v. Universal Management Services, Inc., Corp., 191 F.3d 750, 45 Fed. R. Serv. 3d 676, 1999 FED App. 0328P (6th Cir. 1999)).
The ordinary way in which an article is used, and not the marketing claims by the manufacturer and distributor as to the specific physiological purpose of its use, determines whether the article is “food” for the purposes of the parenthetical exclusion of food from the definition of “drug” under the Food, Drug, and Cosmetic Act. U.S. v. Ten Cartons, Ener-B Nasal Gel, 888 F. Supp. 381 (E.D. N.Y. 1995), judgment aff’d, 72 F.3d 285 (2d Cir. 1995) and (rejected on other grounds by, U.S. v. Universal Management Services, Inc., Corp., 191 F.3d 750, 45 Fed. R. Serv. 3d 676, 1999 FED App. 0328P (6th Cir. 1999)).

[4] U.S. v. Undetermined Quantities of an Article of Drug Labeled as Exachol, 716 F. Supp. 787 (S.D. N.Y. 1989).

[5] U.S. v. Ten Cartons, Ener-B Nasal Gel, 888 F. Supp. 381 (E.D. N.Y. 1995), judgment aff’d, 72 F.3d 285 (2d Cir. 1995) and (rejected on other grounds by, U.S. v. Universal Management Services, Inc., Corp., 191 F.3d 750, 45 Fed. R. Serv. 3d 676, 1999 FED App. 0328P (6th Cir. 1999)).

[6] U.S. v. Ten Cartons, More or Less, of an Article Ener-B Vitamin B-12, 72 F.3d 285 (2d Cir. 1995).

[7] United States v. Undetermined Quantities of All Articles of Finished and In-Process Foods, 936 F.3d 1341 (11th Cir. 2019), cert. denied, 2020 WL 6121597 (U.S. 2020).

[8] American Health Products Co. v. Hayes, 744 F.2d 912 (2d Cir. 1984).

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A. Authority to Regulate; Construction of Regulations

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West's Key Number Digest, Food 1 to 1.7

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II. Regulation

A. Authority to Regulate; Construction of Regulations

§ 3. Authority to regulate food and construction of regulations, generally

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West's Key Number Digest

West's Key Number Digest, Food 1.1, 1.5

It is inherent in the plenary power of the state, which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society, to regulate the food and drink industry.[1] The power to regulate the manufacture and sale of food is found in and limited by the police power of the state.[2] That is, the regulation of health and safety, including laws regulating the proper marketing of food, are traditionally within states' historic police powers.[3]

Food acts and regulations are intended primarily to protect the public from fraud,[4] to secure the general health,[5] to suppress unfair competition in the production and sale of articles of food,[6] and to protect the food supply of the state.[7]

The general rules of statutory construction and interpretation require pure food acts to be construed to advance this legislative intent.[8] Likewise, if the purpose of a pure food statute is plainly expressed and the statute is within the power of the legislature to enact, the courts must give the statute effect according to its terms without construction.[9]

In the interest of protecting the health and safety of its citizens, a legislature may also, pursuant to its police powers, regulate a business associated with advising consumers about food and nutrition.[10]

Footnotes

1 McClellan v. Commonwealth, 39 Va. App. 759, 576 S.E.2d 785 (2003).

2 State v. Armour Packing Co., 124 Iowa 323, 100 N.W. 59 (1904); State v. Starkey, 112 Me. 8, 90 A. 431 (1914); City of St. Louis v. Liessing, 190 Mo. 464, 89 S.W. 611 (1905); Ex parte Arrigo, 98 Neb. 134, 152 N.W. 319 (1915); State v. Normand, 76 N.H. 541, 85 A. 899 (1913); State v. Armour & Co., 27 N.D. 177, 145 N.W. 1033 (1913), aff'd, 240 U.S. 510, 36 S. Ct. 440, 60 L. Ed. 771 (1916); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

[3] Holve v. McCormick & Company, Inc., 334 F. Supp. 3d 535 (W.D. N.Y. 2018).

[4] Corn Products Refining Co. v. Eddy, 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689 (1919); People v. Guiton, 210 N.Y. 1, 103 N.E. 773 (1913); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918); State v. Kofines, 33 R.I. 211, 80 A. 432 (1911); Commonwealth v. Stratford Packing Co., 200 Va. 11, 104 S.E.2d 32 (1958).

[5] Dean Milk Co. v. City of Chicago, 385 Ill. 565, 53 N.E.2d 612 (1944); Reiter v. State, 109 Md. 235, 71 A. 975 (1909); State v. Kofines, 33 R.I. 211, 80 A. 432 (1911); Commonwealth v. Stratford Packing Co., 200 Va. 11, 104 S.E.2d 32 (1958); Hacker v. Barnes, 166 Wash. 558, 7 P.2d 607, 80 A.L.R. 1212 (1932).
The Commonwealth has a substantial interest in protecting the health of its citizens by regulating its food supply. Hill v. Commonwealth, 47 Va. App. 442, 624 S.E.2d 666 (2006).

[6] Ex parte Arrigo, 98 Neb. 134, 152 N.W. 319 (1915); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918); Commonwealth v. Stratford Packing Co., 200 Va. 11, 104 S.E.2d 32 (1958).

[7] Dean Milk Co. v. City of Chicago, 385 Ill. 565, 53 N.E.2d 612 (1944); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918); Commonwealth v. Stratford Packing Co., 200 Va. 11, 104 S.E.2d 32 (1958).

[8] U.S. v. Undetermined Quantities of Bottles of an Article of Veterinary Drug, 22 F.3d 235 (10th Cir. 1994); American Health Products Co., Inc. v. Hayes, 574 F. Supp. 1498 (S.D. N.Y. 1983), judgment aff'd, 744 F.2d 912 (2d Cir. 1984); Professionals and Patients for Customized Care v. Shalala, 847 F. Supp. 1359 (S.D. Tex. 1994), judgment aff'd, 56 F.3d 592 (5th Cir. 1995); People v. Price, 257 Ill. 587, 101 N.E. 196 (1913), aff'd, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); Ex parte Arrigo, 98 Neb. 134, 152 N.W. 319 (1915).

[9] U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658 (1914); Ex parte Arrigo, 98 Neb. 134, 152 N.W. 319 (1915).

[10] Strandwitz v. Ohio Bd. of Dietetics, 83 Ohio App. 3d 183, 614 N.E.2d 817 (10th Dist. Franklin County 1992).
The definitions of food adopted by the statutes and cited by the courts ordinarily include foodstuffs used for feed for animals. Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 126 Mont. 415, 252 P.2d 1040 (1952).

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II. Regulation

A. Authority to Regulate; Construction of Regulations

§ 4. Authority of municipal corporations to regulate food

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West's Key Number Digest

West's Key Number Digest, Food 1.6

A state may delegate its authority to enact reasonable police regulations to protect its inhabitants from unwholesome or adulterated food to a municipal corporation.[1] The express authority to pass ordinances regulating the sale of food is typically conferred upon municipal corporations by statute,[2] or by provision derived from the state constitution.[3] Thus, municipalities may be given the power to regulate the right to sell food in public places by requiring mobile food vendor permits[4] or a license to operate a food establishment.[5] Municipalities may also be given the authority to adopt ordinances to protect the health and safety of its citizens, such as one prohibiting stationary vendors from parking their vehicles on vacant lots and selling food there,[6] or prohibiting a retailer from dispensing bulk food in a particular manner.[7]

A municipal ordinance that producers or processors of local food in the municipality were exempt from licensure and inspection would be construed by the Supreme Judicial Court to exempt such producers or processors only from municipal licensing and inspection requirements, as opposed to state licensing and inspection requirements, so as to avoid an issue of preemption, given that the legislature had already occupied the field with respect to licensing of milk distributors and food establishments.[8]

Footnotes

1 City of Chicago v. Pudlo, 123 Ill. App. 3d 337, 78 Ill. Dec. 375, 462 N.E.2d 494 (1st Dist. 1983).
As to the extent of the police power of municipal corporations, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 358 to 362.

2 Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937); Trigg v. Dixon, 96 Ark. 199, 131 S.W. 695 (1910); City of Chicago v. Chicago & N.W. Ry. Co., 275 Ill. 30, 113 N.E. 849 (1916); State v. Starkey, 112 Me. 8, 90 A. 431 (1914); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910).

3 Justesen's Food Stores v. City of Tulare, 12 Cal. 2d 324, 84 P.2d 140 (1938); City of Dayton v. Jacobs, 120 Ohio St.

225, 7 Ohio L. Abs. 110, 165 N.E. 844 (1929).
As to the grant of police power to a municipal corporation by a state constitution, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 360.

4 Big Apple Food Vendors' Ass'n v. City of New York, 228 A.D.2d 282, 644 N.Y.S.2d 216 (1st Dep't 1996).

5 State v. Westrum, 380 N.W.2d 187 (Minn. Ct. App. 1986).

6 Hispanic Taco Vendors of Washington v. City of Pasco, 790 F. Supp. 1023 (E.D. Wash. 1991), aff'd, 994 F.2d 676 (9th Cir. 1993) (applying Washington city ordinance).

7 Tid Bit Alley, Inc. v. Erie County, 103 Pa. Commw. 46, 520 A.2d 70 (1987).

8 State v. Brown, 2014 ME 79, 95 A.3d 82 (Me. 2014).

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§ 5. Authority of federal government to regulate food

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West's Key Number Digest

West's Key Number Digest, Food 1.1, 1.5

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Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Necessity of formal hearing prior to issuance of regulations under sec. 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. sec. 371(e)), 43 A.L.R. Fed. 320

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

Forms

Am. Jur. Legal Forms 2d § 247:72 (Licensee to comply with food and drug laws)

The authority of the federal government to regulate food rests upon the power of Congress to regulate interstate commerce.[1]

That is, the purpose of the Federal Food, Drug, and Cosmetic Act (FDCA) is to safeguard the consumer by applying it to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer.[2] Thus, Congress may enact federal legislation to keep interstate commerce free from deleterious, adulterated, and misbranded articles of specified types to advance the public health and safety[3] and has done so by such legislation as the Federal Food, Drug, and Cosmetic Act,[4] the Poultry Products Inspection Act,[5] the Federal Meat Inspection Act,[6] the Egg Products Inspection Act,[7] and the Fair Packaging and Labeling Act.[8] These acts and similar legislation insure that products desired by consumers are made available to them in a form and manner consistent with the public health and welfare.[9] In short, the FDCA authorizes the Food and Drug Administration (FDA) to regulate a variety of products, including food, drugs, and cosmetics, for the purpose of protecting the public health.[10]

A federal food act may vest broad rulemaking power to the Secretary of Health and Human Services, who is authorized to promulgate binding, substantive regulations for its enforcement.[11] Federal regulations, for example, provides rules applicable to the owner, operator or agent in charge of a domestic or foreign food facility that manufactures/processes, packs, or holds food for consumption in the United States and is required to register under section 415 of the Federal Food, Drug, and Cosmetic Act,[12] setting forth food defense measures[13] and required records provisions.[14]

The Secretary of Agriculture is authorized to promulgate regulations pursuant to the Federal Meat Inspection Act and the Poultry Products Inspection Act.[15] For example, federal regulations,[16] prescribe the conditions under which states that administer cooperative state poultry products inspection programs and establishments that operate under such programs may participate in a cooperative interstate shipment program.

The power to regulate commerce with foreign nations, expressly conferred upon Congress,[17] is the basis for exerting police power over articles of food sought to be imported into the country.[18]

Since states have traditionally possessed the power to protect their citizens from fraud and deception in the sale of food, there is a strong presumption against federal preemption in the area of marketing food.[19]

Footnotes

1 McDermott v. State of Wis., 228 U.S. 115, 33 S. Ct. 431, 57 L. Ed. 754 (1913); Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998); Produce Place v. U.S. Dept. of Agriculture, 91 F.3d 173 (D.C. Cir. 1996); People ex rel. Brown v. Tri-Union Seafoods, LLC, 171 Cal. App. 4th 1549, 90 Cal. Rptr. 3d 644 (1st Dist. 2009).
As to the power of Congress to regulate interstate commerce, generally, see Am. Jur. 2d, Commerce §§ 25, 26.

2 United States v. USPlabs, LLC, 338 F. Supp. 3d 547 (N.D. Tex. 2018).

3 U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658 (1914); U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998); Carnohan v. U.S., 616 F.2d 1120 (9th Cir. 1980); Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998).

4 21 U.S.C.A. §§ 301 to 399i.

5 21 U.S.C.A. §§ 451 to 472.

6 21 U.S.C.A. §§ 601 to 695
Congress did not act beyond its Commerce Clause power in enacting provisions of Federal Meat Inspection Act (FMIA) and Poultry Products Inspection Act (PPIA) restricting interstate transport of state-inspected meat and poultry, inasmuch as Congress's power to regulate things in interstate commerce included power to ensure that a commodity did not become a thing in interstate commerce. Dailey v. Veneman, 2002 WL 31780191 (6th Cir. 2002).

7 21 U.S.C.A. §§ 1031 to 1056.

8 15 U.S.C.A. §§ 1451 to 1461.

9 National Pork Producers Council v. Bergland, 631 F.2d 1353 (8th Cir. 1980).

[10] Debernardis v. IQ Formulations, LLC, 942 F.3d 1076 (11th Cir. 2019).

[11] Martin v. Ortho Pharmaceuticals, 268 Ill. App. 3d 980, 206 Ill. Dec. 426, 645 N.E.2d 431 (1st Dist. 1994), judgment rev'd on other grounds, 169 Ill. 2d 234, 214 Ill. Dec. 498, 661 N.E.2d 352, 54 A.L.R.5th 765 (1996).

[12] 21 U.S.C.A. § 350d.

[13] 21 C.F.R. §§ 121.126 to 121.157.

[14] 21 C.F.R. §§ 121.301 to 121.330.

[15] Dailey v. Veneman, 2002 WL 31780191 (6th Cir. 2002).

[16] 9 C.F.R. §§ 381.511 to 381.524.

[17] U.S. Const. Art. I, § 8, cl. 3.

[18] Buttfield v. Stranahan, 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904); Mississippi Poultry Ass'n, Inc. v. Madigan, 31 F.3d 293 (5th Cir. 1994); Ganadera Indus., S.A. v. Block, 727 F.2d 1156 (D.C. Cir. 1984).

[19] Clancy v. The Bromley Tea Company, 308 F.R.D. 564 (N.D. Cal. 2013).
Congress did not implicitly intend to preempt states from field of certifying organic foods through the passage of the Organic Foods Production Act (OFPA) that modestly contemplated a certification program designed to effect national standards and to eliminate preexisting "havoc for the industry" caused by balkanized state regulations by requiring states to seek approval from United States Department of Agriculture (USDA) if the state wished to operate an organic certification program, since an express preemption provision in the OFPA was narrow, consumer protection quintessentially was a field that states traditionally had occupied, and presumption existed against preemption. In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation, 621 F.3d 781, 67 A.L.R. Fed. 2d 631 (8th Cir. 2010).

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II. Regulation

A. Authority to Regulate; Construction of Regulations

§ 6. Authority of ministerial boards and officers to regulate food

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West's Key Number Digest

West's Key Number Digest, Food 1.7

Matters relating to methods or details of the regulation of food may be referred by the legislature to a ministerial officer or body authorized to adopt and enforce ordinances, rules, bylaws, or regulations in the aid of the successful execution of general statutory provisions relating to the production and distribution of food.[1]

Matters which may be lawfully delegated to administrative or executive officers include—
— adopting rules fixing minimum standards for foodstuffs.[2]
— providing penalties for violation of the rules adopted.[3]
— promulgating rules prescribing reasonable tolerances and variations from the standards specified by statute.[4]

Footnotes

1 Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995); U.S. v. Gehl, 852 F. Supp. 1150 (N.D. N.Y. 1994); City of Chicago v. Pudlo, 123 Ill. App. 3d 337, 78 Ill. Dec. 375, 462 N.E.2d 494 (1st Dist. 1983); State v. Normand, 76 N.H. 541, 85 A. 899 (1913); Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141, 608 A.2d 1353 (1992).
As to the delegation of powers to officials by municipal legislatures, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 171.

2 Isenhour v. State, 157 Ind. 517, 62 N.E. 40 (1901).

3 Curtice Bros. Co. v. Barnard, 209 F. 589 (C.C.A. 7th Cir. 1913); San Benito Foods v. Veneman, 50 Cal. App. 4th 1889, 58 Cal. Rptr. 2d 571 (6th Dist. 1996) (disapproved of on other grounds by, California Pools, Inc. v. California Contractors' State License Bd., 2004 WL 2361607 (Cal. App. 4th Dist. 2004)); Tops Markets, Inc. v. County of Erie, 156 Misc. 2d 49, 591 N.Y.S.2d 694 (Sup 1992); Reed v. Hansbarger, 173 W. Va. 258, 314 S.E.2d 616 (1984).

4 P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934); National

Farmers Organization Irasburg v. Commissioner of Agriculture, State of Conn., 711 F.2d 1156 (2d Cir. 1983) (applying Connecticut law); Aaron v. Irvin, 259 Ga. 353, 381 S.E.2d 35 (1989); Spell v. Muhammad, 756 So. 2d 748 (Miss. 2000); Tuscan Dairy Farms, Inc. v. Barber, 45 N.Y.2d 215, 408 N.Y.S.2d 348, 380 N.E.2d 179 (1978).

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George L. Blum, J.D.

II. Regulation

B. Validity of Regulations

§ 7. Validity of food regulations, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

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Validity, Construction, and Application of Regulations Dealing with Misrepresentation in Sale of Kosher Food, 3 A.L.R.7th Art. 6

The courts presume the constitutionality of food regulations.[1]

Whether, in a given instance, the manufacture and sale of an article intended for human consumption is deleterious to health, and whether the public welfare demands that such business be prohibited, are primarily questions of fact and policy for the legislature.[2] A legislative declaration that a particular article is unwholesome is generally accepted by the courts, and they will not, as a general rule, investigate to determine whether such declaration is warranted by the facts.[3]

Statutes and ordinances designed to regulate matters relating to food must be reasonable[4] and may not be arbitrary or capricious.[5]

Challenges to food regulations are subject to the arbitrary and capricious standard of review to determine whether the regulation is reasonable[6] or whether its application is reasonable.[7] A regulation that is unreasonable and arbitrary may violate the due process provisions of either a state or the Federal Constitution.[8] The regulations promulgated by the Food and Drug Administration are accorded deference by a court, absent a showing that they are arbitrary, capricious, or manifestly contrary to statute.[9]

The reasonableness of food regulations depends upon the facts of each case.[10] For example, a rule promulgated by a city board of health, which required certain restaurants to provide factual information on health hazards associated with an excess

consumption of sodium, had a rational basis and was not unreasonable, arbitrary, or capricious, and thus did not violate the First Amendment by impermissibly compelling commercial speech.[11]

Statutes or ordinances regulating food, especially those providing criminal penalties for their violation,[12] must be sufficiently definite and certain as to leave no reasonable doubt as to what is intended,[13] although that in some instances opinions differ in respect of what falls within the terms of a statute does not render it void for vagueness.[14]

The term "kosher" in a food ordinance is not overly vague so as to preclude the prosecution of a hot dog vendor for selling, as kosher, hot dogs contaminated with nonkosher sausage grease, given that the ordinance required adherence to orthodox Hebrew religious rules.[15] However, although such a city ordinance has a valid secular purpose of preventing consumer fraud, it substantially entangles the city government in religious matters in violation of the Establishment Clause of the United States Constitution, by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect.[16]

Footnotes

1 Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935); Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937).
As to the presumption of the constitutionality of statutes, generally, see Am. Jur. 2d, Constitutional Law § 165.

2 Hebe Co. v. Shaw, 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255 (1919); Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937); People v. Price, 257 Ill. 587, 101 N.E. 196 (1913), aff'd, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).

3 Powell v. Com. of Pennsylvania, 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1888); People v. Price, 257 Ill. 587, 101 N.E. 196 (1913), aff'd, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); State v. Schlenker, 112 Iowa 642, 84 N.W. 698 (1900); Sanders v. Commonwealth, 117 Ky. 1, 25 Ky. L. Rptr. 1165, 77 S.W. 358 (1903); State v. Layton, 160 Mo. 474, 61 S.W. 171 (1901); Longbrake v. State, 112 Ohio St. 13, 2 Ohio L. Abs. 757, 3 Ohio L. Abs. 99, 146 N.E. 417, 41 A.L.R. 925 (1925); Adams v. City of Milwaukee, 144 Wis. 371, 129 N.W. 518 (1911), aff'd, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913).

4 Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A.L.R. 661 (1924); Schmidinger v. City of Chicago, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913); Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937); City of Chicago v. Pudlo, 123 Ill. App. 3d 337, 78 Ill. Dec. 375, 462 N.E.2d 494 (1st Dist. 1983); State v. Hutchinson Ice Cream Co., 168 Iowa 1, 147 N.W. 195 (1914), aff'd, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916); Big Apple Food Vendors' Ass'n v. City of New York, 228 A.D.2d 282, 644 N.Y.S.2d 216 (1st Dep't 1996).
As to the requirement that legislation be a reasonable exercise of the police power, generally, see Am. Jur. 2d, Constitutional Law § 370.

5 Price v. People of State of Illinois, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); Arent v. Shalala, 70 F.3d 610 (D.C. Cir. 1995); Ganadera Indus., S.A. v. Block, 727 F.2d 1156 (D.C. Cir. 1984); Truth in Labeling Campaign v. Shalala, 999 F. Supp. 1289 (E.D. Mo. 1998); U.S. v. Gehl, 852 F. Supp. 1150 (N.D. N.Y. 1994); State v. Hutchinson Ice Cream Co., 168 Iowa 1, 147 N.W. 195 (1914), aff'd, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916).

6 Grocery Mfrs. of America, Inc. v. Gerace, 755 F.2d 993, 79 A.L.R. Fed. 157 (2d Cir. 1985), judgment aff'd, 474 U.S. 801, 106 S. Ct. 36, 88 L. Ed. 2d 29 (1985); National Milk Producers Federation v. Harris, 653 F.2d 339 (8th Cir. 1981); Alabama Dairy Commission v. Baker & Sons Dairy, Inc., 408 So. 2d 98 (Ala. Civ. App. 1981).

7 National Milk Producers Federation v. Harris, 653 F.2d 339 (8th Cir. 1981); Arent v. Shalala, 70 F.3d 610 (D.C. Cir. 1995); Public Citizen v. Department of Health and Human Services, 632 F. Supp. 220 (D.D.C. 1986); Brooks v. County of Santa Clara, 191 Cal. App. 3d 750, 236 Cal. Rptr. 509 (6th Dist. 1987); City of Chicago v. Pudlo, 123 Ill. App. 3d 337, 78 Ill. Dec. 375, 462 N.E.2d 494 (1st Dist. 1983); McDonald's Corp. v. Board of Selectmen of Randolph, 9 Mass. App. Ct. 830, 399 N.E.2d 38 (1980); Khalil v. Spencer, 143 Misc. 2d 429, 541 N.Y.S.2d 301 (Sup 1989); Schwan's Sales Enterprises, Inc. v. Department of Agriculture, 129 Or. App. 131, 877 P.2d 1214 (1994).

[8] Kenney v. Glickman, 96 F.3d 1118 (8th Cir. 1996); American Meat Institute v. U.S. Dept. of Agriculture, 496 F. Supp. 64 (E.D. Va. 1980), order vacated on other grounds, 646 F.2d 125 (4th Cir. 1981); Alabama Dairy Commission v. Baker & Sons Dairy, Inc., 408 So. 2d 98 (Ala. Civ. App. 1981).

[9] U.S. v. Baxter Healthcare Corp., 712 F. Supp. 1352 (N.D. Ill. 1989), order aff'd, 901 F.2d 1401 (7th Cir. 1990).

[10] International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996); Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937).

[11] National Restaurant Ass'n v. New York City Dept. of Health & Mental Hygiene, 148 A.D.3d 169, 49 N.Y.S.3d 18 (1st Dep't 2017).
The mandate of a Vermont statute, which required certain manufacturers and retailers to identify whether raw and processed food sold in Vermont was produced through genetic engineering (GE), did not require the disclosure of "controversial" information in connection with a commercial transaction, as required for the application of the reasonable relationship standard of review of a statute under the First Amendment. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015) (applying Vermont law).

[12] U.S. v. Strauss, 999 F.2d 692, 39 Fed. R. Evid. Serv. 720 (2d Cir. 1993).

[13] U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998); Magic Valley Potato Shippers, Inc. v. Secretary of Agr., 702 F.2d 840 (9th Cir. 1983); U.S. v. Agnew, 931 F.2d 1397, 32 Fed. R. Evid. Serv. 1151 (10th Cir. 1991); Territory v. Hop Kee, 21 Haw. 206, 1912 WL 1656 (1912); City of Chicago v. Chicago & N.W. Ry. Co., 275 Ill. 30, 113 N.E. 849 (1916); State v. Westrum, 380 N.W.2d 187 (Minn. Ct. App. 1986); State v. Ehlenfeldt, 94 Wis. 2d 347, 288 N.W.2d 786 (1980).
As to the requirement that criminal statutes be definite and certain, generally, see Am. Jur. 2d, Criminal Law § 15.

[14] Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S. Ct. 141, 69 L. Ed. 402 (1925); Milk Industry Foundation v. Glickman, 967 F. Supp. 564 (D.D.C. 1997), decision aff'd, 132 F.3d 1467 (D.C. Cir. 1998); Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food and Rural Resources, 483 A.2d 1213 (Me. 1984).

[15] Barghout v. Mayor & City Council, 325 Md. 311, 600 A.2d 841 (1992).
The New York Kosher Law Protection Act's requirements for labeling and marketing of food sold as kosher had a rational basis and were minimally burdensome, and thus did not violate the free-exercise rights of owners of a deli specializing in kosher food; the requirements' goal was to prevent fraud in the kosher food market by labeling as such food products that were marketed as kosher and the basis for kosher designation, and the Act did not define "kosher" or prevent a producer or seller of kosher products from certifying products as kosher pursuant to its own standards. Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194 (2d Cir. 2012).

[16] Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) (applying Maryland city ordinance); Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141, 608 A.2d 1353 (1992).

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35A Am. Jur. 2d Food § 8

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§ 8. Discrimination between classes of food products with respect to regulation

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There is no constitutional obligation to subject every article of food to the same regulation,[1] so pure food acts are not required to cover all articles of food.[2] The legislature may make different regulations covering different classes of foods[3] or may adopt laws which regulate some classes only, provided the classifications have some reasonable basis and are not arbitrary and capricious.[4]

Although the Equal Protection Clause in the Federal Constitution contemplates classes of persons, and the protection is deemed equal if all persons in the same class are treated alike under like circumstances and conditions,[5] a claim of discrimination because a federal regulation or prohibition is not extended to other articles of food is invalid, because the Fifth Amendment has no Equal Protection Clause.[6]

A butter-grading statute did not violate the Equal Protection Clause, despite a dairy producer's argument that there was no rational reason for the state to treat graded and ungraded butters differently, where the producer failed to negate every conceivable basis for the statute, and where, even if the state was required to present evidence supporting its market-based rationale, an historical background of the statute strongly suggested that the statute was rationally related to the state's legitimate interest in stimulating demand and protecting the state's national reputation in the butter industry.[7]

The legislature cannot prohibit the manufacture and sale of a wholesome food product for the purpose of protecting one industry against competition from another;[8] nor can it, under the guise of exerting its police powers or of enacting inspection laws, pass food acts which discriminate against the products and industries of some of the states in favor of the products and industries of its own or of other states.[9]

Footnotes

[1] U.S. v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); State v. Sherod, 80 Minn. 446, 83

N.W. 417 (1900); Freadrich v. State, 89 Neb. 343, 131 N.W. 618 (1911); Longbrake v. State, 112 Ohio St. 13, 2 Ohio L. Abs. 757, 3 Ohio L. Abs. 99, 146 N.E. 417, 41 A.L.R. 925 (1925); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).

[2] Armour & Co. v. State of North Dakota, 240 U.S. 510, 36 S. Ct. 440, 60 L. Ed. 771 (1916); Freadrich v. State, 89 Neb. 343, 131 N.W. 618 (1911); Longbrake v. State, 112 Ohio St. 13, 2 Ohio L. Abs. 757, 3 Ohio L. Abs. 99, 146 N.E. 417, 41 A.L.R. 925 (1925).

[3] Capital City Dairy Co. v. State of Ohio, 183 U.S. 238, 22 S. Ct. 120, 46 L. Ed. 171 (1902) (oleomargarine); New York State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n, 26 F. Supp. 2d 249 (D. Mass. 1998), aff'd, 198 F.3d 1 (1st Cir. 1999); Golden Cheese Co. v. Voss, 230 Cal. App. 3d 547, 281 Cal. Rptr. 587 (4th Dist. 1991); State v. Sherod, 80 Minn. 446, 83 N.W. 417 (1900) (baking powder); Finucane v. Pennsylvania Milk Marketing Bd., 150 Pa. Commw. 319, 615 A.2d 936 (1992).

[4] Price v. People of State of Illinois, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); Grocery Mfrs. of America, Inc. v. Gerace, 755 F.2d 993, 79 A.L.R. Fed. 157 (2d Cir. 1985), judgment aff'd, 474 U.S. 801, 106 S. Ct. 36, 88 L. Ed. 2d 29 (1985); Geja's Cafe v. Metropolitan Pier and Exposition Authority, 153 Ill. 2d 239, 180 Ill. Dec. 135, 606 N.E.2d 1212 (1992); State v. Fairmont Creamery Co. of Nebraska, 153 Iowa 702, 133 N.W. 895 (1911); Finucane v. Pennsylvania Milk Marketing Bd., 136 Pa. Commw. 272, 582 A.2d 1152 (1990).
As to the constitutionality of classifications, generally, see Am. Jur. 2d, Constitutional Law § 845.

[5] Am. Jur. 2d, Constitutional Law § 865.

[6] U.S. v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

[7] Minerva Dairy, Inc. v. Harsdorf, 905 F.3d 1047 (7th Cir. 2018), cert. denied, 139 S. Ct. 2746, 204 L. Ed. 2d 1134 (2019) (applying Wisconsin law).

[8] Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 94 Idaho 308, 486 P.2d 1021 (1971); John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N.W. 369, 53 A.L.R. 463 (1927).

[9] Voight v. Wright, 141 U.S. 62, 11 S. Ct. 855, 35 L. Ed. 638 (1891); State of Minnesota v. Barber, 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455 (1890); Safeway Stores, Inc. v. Board of Agriculture of State of Hawaii, 590 F. Supp. 778 (D. Haw. 1984).
As to the power to enact inspection laws, see Am. Jur. 2d, Inspection Laws § 3.

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35A Am. Jur. 2d Food § 9

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§ 9. Conflict between food statutes and ordinances

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When there are state statutes regulating foods and municipal ordinances on the same subject, both may stand so long as the local ordinances do not conflict with the state statutes and are not unreasonable or discriminatory in themselves.[1] Municipal ordinances and regulations are subject to the paramount authority of the legislature and must give way when they conflict with a state statute.[2] Consequently, an ordinance regulating the sale and distribution of foods may not forbid that which a statute permits.[3]

Footnotes

1 Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006); Crackerjack Co. v. City of Chicago, 330 Ill. 320, 161 N.E. 479, 58 A.L.R. 287 (1928); City of St. Louis v. Ameln, 235 Mo. 669, 139 S.W. 429 (1911); Cowgirl, Inc. v. Department of Consumer Affairs of the City of New York, 234 A.D.2d 42, 650 N.Y.S.2d 678 (1st Dep't 1996); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910); Hardin v. City of Radford, 112 Va. 547, 72 S.E. 101 (1911).

2 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 306.

3 Crackerjack Co. v. City of Chicago, 330 Ill. 320, 161 N.E. 479, 58 A.L.R. 287 (1928); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910).

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35A Am. Jur. 2d Food § 10

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§ 10. Conflict between federal and state authority regarding food regulations

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Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Validity, under Commerce Clause (Art I, sec. 8, cl 3), of state statutes regulating labeling of food, 79 A.L.R. Fed. 246

Federal pre-emption of state food labeling legislation or regulation, 79 A.L.R. Fed. 181

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

A statute that obstructs the purposes of a federal food law violates the Supremacy Clause of the Constitution.[1] Likewise, if an area is preempted by Congress under the Supremacy Clause of the Constitution, a contradictory state law is invalid.[2] Plaintiffs may not bring actions to enforce violations of the Federal Food, Drug, and Cosmetic Act. Instead, private plaintiffs may bring analogous state law claims as long as the FDCA does not preempt those claims.[3]

A food statute that imposes a clearly excessive burden on the free flow of interstate commerce, in relation to the putative local benefits to be derived from it, is unconstitutional as a violation of the Commerce Clause.[4] State statutes and municipal ordinances that do not conflict with federal food legislation are not preempted.[5]

The areas in which state regulations are preempted include, but are not limited to, the labeling of dairy,[6] poultry[7] and meat products,[8] and weight measurement requirements.[9]

A federal statute permitting the exportation of food which complies with the laws of the foreign country to which it is intended for export does not preempt a more restrictive state regulation.[10]

Footnotes

1 Cook Family Foods, Ltd. v. Voss, 781 F. Supp. 1458 (C.D. Cal. 1991); Lever Bros. Co. v. Maurer, 712 F. Supp. 645 (S.D. Ohio 1989).
As to the supremacy of federal law, see Am. Jur. 2d, Constitutional Law § 57.

2 National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994); Committee for Accurate Labeling and Marketing v. Brownback, 665 F. Supp. 880 (D. Kan. 1987); American Meat Institute v. Ball, 550 F. Supp. 285 (W.D. Mich. 1982), judgment aff'd, 724 F.2d 45 (6th Cir. 1984); Goya De Puerto Rico Inc. v. Santiago, 59 F. Supp. 2d 274 (D.P.R. 1999).

3 Kroessler v. CVS Health Corporation, 977 F.3d 803 (9th Cir. 2020).

4 Great Atlantic & Pac. Tea Co., Inc. v. Cottrell, 424 U.S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); United Egg Producers v. Department of Agriculture of Com. of Puerto Rico, 77 F.3d 567 (1st Cir. 1996); American Meat Institute v. Ball, 550 F. Supp. 285 (W.D. Mich. 1982), judgment aff'd, 724 F.2d 45 (6th Cir. 1984); State, Dept. of Fisheries v. DeWatto Fish Co., 34 Wash. App. 135, 660 P.2d 298 (Div. 2 1983), judgment rev'd on other grounds, 100 Wash. 2d 568, 674 P.2d 659 (1983); Coffee-Rich, Inc. v. Wisconsin Dept. of Agriculture, 70 Wis. 2d 265, 234 N.W.2d 270 (1975).
As to the constitutionality of state activities that burden interstate commerce, see Am. Jur. 2d, Commerce §§ 38, 39.

5 Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977); Cavel Intern., Inc. v. Madigan, 500 F.3d 551 (7th Cir. 2007); Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278 (7th Cir. 1978); School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 683 A.2d 972 (Pa. Commw. Ct. 1996).

6 Committee for Accurate Labeling and Marketing v. Brownback, 665 F. Supp. 880 (D. Kan. 1987) (a Kansas statute which requires the legend "an artificial dairy product" on the label of such product, obstructs the accomplishment the purposes of federal food labeling laws).

7 National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994) (that the California statute that prohibits wholesalers from using the word "fresh" on labels for poultry and poultry products unless the poultry had been stored at temperatures at or above 26 degrees imposes a labeling requirement that is "in addition to" the federal labeling requirements and thus preempted).
A California statute banning the in-state sale of foie gras produced by force-feeding ducks and geese did not constitute an ingredient requirement and thus was not preempted by the Federal Poultry Products Inspection Act's (PPIA) express preemption provision, where the California statute sought to prohibit a feeding method the state deemed cruel and inhumane rather than an ingredient of a poultry product, and where the difference between foie gras produced with force-fed birds and that produced with nonforce-fed birds was not one of ingredient, but one of feeding technique. Association des Éleveurs de Canards et d'Oies du Quebec v. Becerra, 870 F.3d 1140 (9th Cir. 2017), cert. denied, 139 S. Ct. 862, 202 L. Ed. 2d 567 (2019) (applying, in part, California law).
Express preemption provisions of the Poultry Products Inspection Act (PPIA) and Federal Meat Inspection Act (FMIA) were implicated by consumers' putative class action state law claims related to mislabeling soup as a healthy product, where the claims sought to apply California's Unfair Competition Law (UCL), False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), and Commercial Code in a way that would impose labeling requirements. Brower v. Campbell Soup Company, 243 F. Supp. 3d 1124 (S.D. Cal. 2017) (applying, in part, California law).

8 Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).
Based on the close textual relationship between the point of sale warning and the product to which it relates, a point of sale warning with respect to meat or meat products constituted "labeling" within the meaning of the Federal Meat Inspection Act's (FMIA) preemption clause, and thus, California Safe Drinking Water and Toxic Enforcement Act's point of sale warning requirements with respect to meat were preempted by FMIA. American Meat Institute v.

Leeman, 180 Cal. App. 4th 728, 102 Cal. Rptr. 3d 759 (4th Dist. 2009).
Federal Meat Inspection Act (FMIA), which contained an express preemption clause limiting states in their ability to govern meat inspection and labeling requirements, did not expressly preempt Texas's prohibition on horsemeat for human consumption. Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326 (5th Cir. 2007).
The Federal Meat Inspection Act (FMIA) and Poultry Products Inspection Act (PPIA) expressly preempted a consumer's state law claims against the manufacturer of meat products for violation of the Florida Deceptive and Unfair Trade Practices (FDUTPA), negligent misrepresentation, misleading advertising, breach of express warranty, and unjust enrichment, alleging "100% Natural" and "No Preservatives" claims on products were false, misleading, and deceptive because product allegedly contained synthetic ingredients and preservatives; the United States Department of Agriculture's (USDA) Food Safety Inspection Service (FSIS) had preapproved all labels at issue, and the consumer improperly sought to impose additional or different requirements on the manufacturer's labeling than those required by the USDA. Phelps v. Hormel Foods Corporation, 244 F. Supp. 3d 1312 (S.D. Fla. 2017) (applying, in part, Florida law).

[9] Cook Family Foods, Ltd. v. Voss, 781 F. Supp. 1458 (C.D. Cal. 1991) (a state was enjoined from enforcing its regulations and procedures dealing with the weighing of cured pork products which were inconsistent with the requirements of the Federal Meat Inspection Act).

[10] U.S. v. McDougall, 25 F. Supp. 2d 85 (N.D. N.Y. 1998).

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Research References

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A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
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§ 11. Food licensing regulations

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Statutory trust under Perishable Agricultural Commodities Act (7 U.S.C.A. secs. 499a et seq.), 128 A.L.R. Fed. 303

Sanctions under Perishable Agricultural Commodities Act (7 U.S.C.A. secs. 499 et seq.), 127 A.L.R. Fed. 225

Reparation proceedings under Perishable Agricultural Commodities Act (7 U.S.C.A. secs. 499a et seq.), 126 A.L.R. Fed. 487

Forms

Am. Jur. Legal Forms 2d § 120:3 (Application for license—To operate food processing plant)
Am. Jur. Legal Forms 2d § 120:6 (Compliance with food regulations)
Am. Jur. Legal Forms 2d § 120:7 (Compliance with regulations—Seller's warranty)
Am. Jur. Pleading and Practice Forms, Food § 4 (Complaint, petition or declaration—Allegation—To enjoin enforcement of statute declaring that use of certain ingredient constitutes adulteration of beverage—Violation of due process clause of Fourteenth Amendment)

Ordinarily, the legislature determines the appropriate remedy to enforce its pure food regulations.[1]

The manufacture and sale of food may be regulated by license.[2] License fees or license taxes on food businesses or occupations are derived from the police power of the state to regulate or prohibit a particular business.[3] Licenses may be

required, for example, of produce dealers;[4] commission merchants, dealers, or brokers of perishable agricultural commodities in interstate or foreign commerce;[5] meat vendors;[6] restauranteurs;[7] and catering establishments.[8]

Footnotes

1 Nolan v. Jones, 263 Pa. 124, 106 A. 235 (1919).

2 Trigg v. Dixon, 96 Ark. 199, 131 S.W. 695 (1910); City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S.W. 617 (1905); New Hampshire Dept. of Health and Human Services v. Bonser, 150 N.H. 250, 836 A.2d 761 (2003); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918); City of Portland v. Traynor, 94 Or. 418, 183 P. 933, 6 A.L.R. 1410 (1919); Adams v. City of Milwaukee, 144 Wis. 371, 129 N.W. 518 (1911), aff'd, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913).

3 City of Chicago v. R. & X. Restaurant, 369 Ill. 65, 15 N.E.2d 725, 117 A.L.R. 1313 (1938); Khalil v. Spencer, 143 Misc. 2d 429, 541 N.Y.S.2d 301 (Sup 1989); City of Portland v. Traynor, 94 Or. 418, 183 P. 933, 6 A.L.R. 1410 (1919); Provo City v. Provo Meat & Packing Co., 49 Utah 528, 165 P. 477 (1917).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

4 County Produce, Inc. v. U.S. Dept. of Agriculture, 103 F.3d 263 (2d Cir. 1997).

5 7 U.S.C.A. §§ 499a to 499s.

6 Windy City Meat Co., Inc. v. U.S. Dept. of Agriculture, 926 F.2d 672 (7th Cir. 1991); Original Honey Baked Ham Co. of Georgia, Inc. v. Glickman, 172 F.3d 885 (D.C. Cir. 1999); Aaron v. Irvin, 259 Ga. 353, 381 S.E.2d 35 (1989); Cox v. Louisiana Dept. of Agriculture and Forestry, 636 So. 2d 950 (La. Ct. App. 1st Cir. 1994), writ denied, 642 So. 2d 875 (La. 1994) and writ denied, 642 So. 2d 875 (La. 1994).

7 Am. Jur. 2d, Hotels, Motels, and Restaurants § 37.
The allegations of a holder of a business license for a restaurant, that the city suspended her license after members of a gang unaffiliated with the restaurant shot at and into the restaurant, but the city did not suspend the licenses of two other businesses that experienced random shootings with unknown shooters, stated a claim for a class-of-one equal protection violation based on selective enforcement. Johnson v. Morales, 946 F.3d 911 (6th Cir. 2020).

8 Cowgirl, Inc. v. Department of Consumer Affairs of the City of New York, 234 A.D.2d 42, 650 N.Y.S.2d 678 (1st Dep't 1996).
As to the regulation of selling or buying milk products, see § 42.

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35A Am. Jur. 2d Food § 12

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II. Regulation

C. Modes of Regulation

§ 12. Food inspection regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3

A.L.R. Library

Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Validity of inspection conducted under provisions of Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. sec. 374(a)) authorizing FDA inspectors to enter and inspect food, drug, or cosmetic factory, warehouse, or other establishment, 18 A.L.R. Fed. 734

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

Forms

Am. Jur. Legal Forms 2d § 120:4 (Contract—Maintenance of food processing plant to meet inspection standards of regulatory agency)
Am. Jur. Legal Forms 2d § 120:8 (Payment conditioned on product passing inspection by regulatory agency)

In enacting the Federal Meat Inspection Act[1] and the Food, Drug and Cosmetic Act,[2] Congress focused primarily on the dangers presented by the sale of unwholesome foods,[3] both by establishing standards for the proper marking and labeling of products and by assuring the proper branding and packaging of food products.[4] In authorizing the promulgation of standards of identity under such statutes, Congress intended to prevent economic adulteration, the erosion of food integrity and the sale of products inferior to those the consumer expects to receive.[5]

In addition, if the Secretary of Health and Human Services has a reasonable belief that an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, is adulterated and presents a threat of serious adverse health consequences or death to humans or animals, each person (excluding farms and restaurants) who manufactures, processes, packs, distributes, receives, holds, or imports such article must, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, upon presentation of appropriate credentials and a written notice to such person, at reasonable times and within reasonable limits and in a reasonable manner, to have access to and copy all records relating to such article, and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, that are needed to assist the Secretary in determining whether the food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals.[6] Moreover, if the Secretary believes that there is a reasonable probability that the use of or exposure to an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, will cause serious adverse health consequences or death to humans or animals, each person (excluding farms and restaurants) who manufactures, processes, packs, distributes, receives, holds, or imports such article must, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, upon presentation of appropriate credentials and a written notice to such person, at reasonable times and within reasonable limits and in a reasonable manner, to have access to and copy all records relating to such article and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, that are needed to assist the Secretary in determining whether there is a reasonable probability that the use of or exposure to the food will cause serious adverse health consequences or death to humans or animals.[7] Additionally, the requirements set forth in the statute[8] applies to all records relating to the manufacture, processing, packing, distribution, receipt, holding, or importation of such article maintained by or on behalf of such person in any format (including paper and electronic formats) and at any location.[9]

The Secretary is also required to give high priority to increasing the number of inspections for the purpose of enabling the Secretary to inspect food offered for import at ports of entry into the United States, with the greatest priority given to inspections to detect the intentional adulteration of food.[10] Additionally, the Secretary must identify high-risk facilities and allocate resources to inspect facilities according to the known safety risks of the facilities, and must increase the frequency of inspection of all facilities, as specified.[11] The Secretary is also required to adhere to provisions regarding: the inspection of foreign facilities; the reliance on federal, state, or local inspections; the identification and inspection at ports of entry; and interagency agreements with respect to seafood.[12]

Inspections conducted pursuant to the federal food statutes are reasonable when the period of the inspections is proportionate to the size of the place where the inspections occur, the inspections are made during normal business, and they do not interfere with the normal course of business.[13] A modified meat and poultry inspection program, under which federal inspectors examined poultry carcasses only after industry employees had eviscerated, sorted, trimmed, and rinsed the carcasses, did not violate the Poultry Products Inspection Act requiring federal inspectors to conduct "post mortem inspection of the carcass of each bird processed" and to condemn adulterated "parts," where most poultry diseases and conditions could be readily discerned by inspecting the carcasses alone, the program called for condemning all viscera that corresponded to adulterated carcasses, and remaining disease was adequately handled by having the inspectors examine viscera from the initial 300 birds slaughtered from each flock.[14]

Public health officials are given full and complete authority to make inspections, absent evidence showing an improper motive.[15] Inspection of a food establishment is reasonable, and probable cause exists to issue a warrant for that inspection, when the municipality seeks to protect the health and safety of its consumers, the scope of the intrusion is limited to areas where food is produced or stored, and the inspection is not arbitrary.[16]

The seizure of a quantity of milk necessary for its inspection without a warrant is authorized.[17] A statute investing a milk control board or its designated employees with the power to enter at all reasonable hours any place where milk is produced, processed, bottled, or sold, and to inspect all the pertinent records of the establishment for the purpose of ascertaining facts to enable the board to administer the statute does not violate constitutional search and seizure provisions.[18]

The pursuit of criminal enforcement of a federal act at the time of the inspection, standing alone, does not imply or suggest that the inspections were conducted in bad faith.[19]

Statutes and ordinances providing for the inspection of food offered for sale and requiring the payment of fees[20] for the purpose of defraying the cost of such an inspection are a proper exercise of the police power of the state.[21]

The Protecting America's Food and Agriculture Act of 2019 provides for the availability of adequate resources at the border to conduct inspections of incoming food and agriculture.[22]

Footnotes

1 21 U.S.C.A. §§ 601 to 695.

2 21 U.S.C.A. §§ 301 to 399i.

3 Tennessee Valley Ham Co., Inc. v. Bergland, 493 F. Supp. 1007 (W.D. Tenn. 1980).

4 Michigan Meat Ass'n v. Block, 514 F. Supp. 560 (W.D. Mich. 1981).

5 Tennessee Valley Ham Co., Inc. v. Bergland, 493 F. Supp. 1007 (W.D. Tenn. 1980).

6 21 U.S.C.A. § 350c(a)(1).

7 21 U.S.C.A. § 350c(a)(2).

8 21 U.S.C.A. §§ 350c(a)(1), 350c(a)(2).

9 21 U.S.C.A. § 350c(a)(3).

10 21 U.S.C.A. § 381(h)(1).

11 21 U.S.C.A. §§ 350j(a)(1), 350j(a)(2).

12 21 U.S.C.A. §§ 350j(a)(2)(D), 350j(a)(2)(E), 350j(b), 350j(c).

13 U.S. v. New England Grocers Supply Co., 488 F. Supp. 230 (D. Mass. 1980).

14 American Federation of Government Employees, AFL-CIO v. Veneman, 284 F.3d 125 (D.C. Cir. 2002), referring to 21 U.S.C.A. § 455.

15 Southeastern Minerals, Inc. v. Harris, 622 F.2d 758 (5th Cir. 1980); Juici-Rich Products, Inc. v. Lowe, 735 F. Supp. 1387 (C.D. Ill. 1990).

16 City of Chicago v. Pudlo, 123 Ill. App. 3d 337, 78 Ill. Dec. 375, 462 N.E.2d 494 (1st Dist. 1983).
Warrantless search of goat cheese manufacturing facility was reasonable; the Commonwealth had a significant interest in ensuring that goat cheese produced by defendants for commercial sale was safe for consumption, the Virginia Food Act's purpose of ensuring the safe production and storage of foods offered to the public for consumption could only be furthered by unannounced, warrantless inspections, and the regulations notified defendants that Virginia law authorized the inspections. Hill v. Commonwealth, 47 Va. App. 442, 624 S.E.2d 666 (2006).
As to inspection warrants, generally, see Am. Jur. 2d, Inspection Laws § 17.

17 City of St. Louis v. Liessing, 190 Mo. 464, 89 S.W. 611 (1905).

18 Albert v. Milk Control Bd., 210 Ind. 283, 200 N.E. 688 (1936).

19 U.S. v. Gel Spice Co., Inc., 773 F.2d 427 (2d Cir. 1985).

20 J. R. Simplot Co. v. Department of Agriculture, 340 Or. 188, 131 P.3d 162 (2006); Utah Restaurant Ass'n v. Salt Lake City-County Bd. of Health, 771 P.2d 671 (Utah Ct. App. 1989).

21 Standard Stock Food Co. v. Wright, 225 U.S. 540, 32 S. Ct. 784, 56 L. Ed. 1197 (1912); Texas Food Industry Ass'n v. Espy, 870 F. Supp. 143 (W.D. Tex. 1994); State v. Starkey, 112 Me. 8, 90 A. 431 (1914); State v. Elam, 91 Neb. 460, 136 N.W. 59 (1912); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).

22 6 U.S.C.A. § 211.

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II. Regulation

C. Modes of Regulation

§ 13. Food inspection regulations—Federal Meat Inspection Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3

The Secretary of Agriculture has the discretion to delay or refuse a meat plant inspection when a person "responsibly connected" with an applicant for inspection is unfit by reason of a felony conviction.[1] In determining whether an entity may be refused meat inspection services on the basis of an employee's prior felony conviction, the Department of Agriculture must form a judgment about the nature of the employee's offense, including any mitigating circumstances, and the extent to which the past criminal conduct threatens the objectives of the statute.[2]

Convictions for distributing adulterated food[3] or for making illegal payments to meat inspectors and graders, when supported by substantial evidence, support an administrative decision to withdraw a meat processing and packaging operation's federal inspection and grading services.[4] Mitigating factors, including the person's reputation in the community and rehabilitation, must outweigh the risk to the public of continuing such services in light of the severity of the offense.[5]

Footnotes

1 21 U.S.C.A. § 671.
As to meat inspection, generally, see Federal Procedure, L. Ed. §§ 35:525 to 35:545.

2 Chernin v. Lyng, 874 F.2d 501 (8th Cir. 1989).

3 Toscony Provision Co., Inc. v. Block, 538 F. Supp. 318 (D.N.J. 1982).

4 Windy City Meat Co., Inc. v. U.S. Dept. of Agriculture, 926 F.2d 672 (7th Cir. 1991); Utica Packing Co. v. Bergland, 511 F. Supp. 655 (E.D. Mich. 1981).

5 Windy City Meat Co., Inc. v. U.S. Dept. of Agriculture, 926 F.2d 672 (7th Cir. 1991).

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D. Matters of Regulation

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Food 1.7, 5, 7, 12, 15

West's Key Number Digest, Weights and Measures 1 to 3, 5

A.L.R. Library

A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
West's A.L.R. Digest, Food 1.7, 5, 7, 12, 15
West's A.L.R. Digest, Weights and Measures 1 to 3, 5

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II. Regulation

D. Matters of Regulation

1. In General

§ 14. Food regulations concerning containers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Weights and Measures 1 to 3, 5

Forms

Am. Jur. Pleading and Practice Forms, Food § 3 (Complaint, petition or declaration—For declaratory judgment and injunction—To declare statute prohibiting sale of food in package or container of more or less than specific size, or weight unconstitutional and to enjoin enforcement)

The enactment of reasonable regulations concerning the containers in which food products may be sold, as a means of protecting the public from fraud or preventing unfair competition, is within the scope of the police power.[1] For example, under the Food, Drug, and Cosmetic Act (FDCA), containers that include "slack-fill," that is, the difference between the actual capacity of a container and the volume of product contained therein, are misleading if consumers cannot fully view the contents and if the slack-fill is nonfunctional.[2]

The state may require particular foods to be sold in containers and may specify the kind of container suitable for such purpose.[3] Such regulations do not burden interstate commerce when they are applicable solely to intrastate trade.[4] Sale of goods in a container bearing the trademark of another, unless the product is contained in the original package, may be prohibited.[5]

A statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sales in other nonreturnable, nonrefillable containers such as paperboard cartons does not deny the packagers either equal protection or substantive due process.[6] Such a statute bears a rational relation to the stated objectives of promoting resource conservation, easing solid waste disposal problems and conserving energy and, thus, passes muster under the equal protection rationality test.[7]

The Federal Food, Drug and Cosmetic Act did not delegate to the Food and Drug Administration (FDA) authority to address the packaging of food and dietary supplement products except to the extent necessary to address the risks of adulteration.[8]

Footnotes

1 Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935); Stegmann v. Weeke, 279 Mo. 140, 214 S.W. 137, 5 A.L.R. 1060 (1919).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

2 Benson v. Fannie May Confections Brands, Inc., 944 F.3d 639 (7th Cir. 2019).
The district court would decline to apply the primary jurisdiction doctrine, to stay a consumer class action against a grocery store chain, alleging that the chain engaged in illegal and deceptive practices of underfilling cans of tuna, pending the Food and Drug Administration's (FDA) review of the FDCA's pressed weight standard and chain's application for a temporary marketing permit; although Congress placed food regulation in the FDA, the core issue was whether a reasonable consumer would be misled by chain's marketing, which the district court was competent to address. In re Trader Joe's Tuna Litigation, 289 F. Supp. 3d 1074, 93 U.C.C. Rep. Serv. 2d 1163 (C.D. Cal. 2017).

3 Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935); Linnenkamp v. Linn, 243 Iowa 329, 51 N.W.2d 393 (1952).

4 Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935).

5 People v. Luhrs, 195 N.Y. 377, 89 N.E. 171 (1909).

6 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).

7 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).
As to the rational basis test, see Am. Jur. 2d, Constitutional Law §§ 850 to 852.

8 Nutritional Health Alliance v. Food and Drug Admin., 318 F.3d 92 (2d Cir. 2003).
As to when food is considered adulterated under the Federal Food, Drug, and Cosmetic Act, see §§ 20 to 22.

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II. Regulation

D. Matters of Regulation

1. In General

§ 15. Food regulations concerning cold storage

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 12

Legislation regulating the storage and sale of cold-storage food is aimed at protecting the public health and preventing fraud and deception[1] by prohibiting the storage of food in cold storage longer than the prescribed time or offering such food for sale.[2] The fact that the food may be wholesome for a longer period than stipulated by statute does not affect the validity of the legislation.[3]

Cold-storage regulations may include the labeling of articles of food which have been kept in cold storage with the words "cold storage."[4]

The mere storage of food for longer than the prescribed period does not constitute per se a violation of a statute prohibiting the sale of such items.[5]

Footnotes

1 Leonard v. State, 100 Ohio St. 456, 127 N.E. 464 (1919); Nolan v. Jones, 263 Pa. 124, 106 A. 235 (1919).

2 People v. Wendel, 217 N.Y. 260, 111 N.E. 846 (1916); Columbus Packing Co. v. State, 106 Ohio St. 469, 1 Ohio L. Abs. 100, 140 N.E. 376, 37 A.L.R. 1525 (1922).

3 Nolan v. Jones, 263 Pa. 124, 106 A. 235 (1919).

4 Department of Farms and Markets of State of New York v. Swift & Co., 105 Misc. 225, 174 N.Y.S. 200 (Sup 1918).

5 Columbus Packing Co. v. State, 106 Ohio St. 469, 1 Ohio L. Abs. 100, 140 N.E. 376, 37 A.L.R. 1525 (1922).

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II. Regulation

D. Matters of Regulation

1. In General

§ 16. Food regulations concerning substitutes and imitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 7

The primary purpose of setting standards of identity of the components of food is to protect a consumer from the economic alteration of foods by which less expensive ingredients are substituted for more expensive ingredients.[1] Regulations pertaining to standards of identity are designed to prevent the sale, under traditional names, of products bearing no resemblance to the items commonly sold under those names.[2]

The legislature determines what precautions must be observed to prevent the deceptive sale of food products.[3] The courts will interfere only when the specific means prescribed by the legislature to prevent the deception are unreasonable or arbitrary.[4]

The Federal Food and Drug Administration's regulation defining an "imitation food" as a food which is a substitute for and resembles another food but is nutritionally inferior to that food, as determined by comparing the percentages of the so-called "essential nutrients" in the substitute to those in the food for which it substitutes,[5] is both reasonable and within the ambit of the agency's discretion.[6] The Federal Department of Agriculture's practice of following the Food and Drug Administration's definition of "imitation" when reviewing the labels of meat and poultry products containing alternative cheese products is valid and entitled to judicial respect.[7]

A dairy's sale of all-natural milk from which the cream had been skimmed was not unlawful, and did not serve to deprive the dairy's commercial speech with respect to this milk of First Amendment protection, though the skimming process removed Vitamin A from the milk, though the dairy refused to incorporate any additives in its milk, including Vitamin A, and though Florida law prohibited the sale of unfortified skim milk. Florida acknowledged that the dairy's unfortified milk could be sold under an "imitation" milk statute, meaning that the dairy's conduct in selling its milk was not illegal, and that the State objected only to the dairy's speech in describing this milk as "skim milk."[8]

Footnotes

[1] Plumley v. Com. of Mass., 155 U.S. 461, 15 S. Ct. 154, 39 L. Ed. 223 (1894); U.S. v. An Article of Food Consisting of 126 Cases, More or Less, Each Containing 12 Three-Pound Jars, Labeled: (Case and Jar) Pure Raw Honey Packed For J.G. Samples, 550 F. Supp. 15 (W.D. Okla. 1982); People v. Freeman, 242 Ill. 373, 90 N.E. 366 (1909); State v. Armour Packing Co., 124 Iowa 323, 100 N.W. 59 (1904); State v. Rogers, 95 Me. 94, 49 A. 564 (1901); State v. Hanson, 84 Minn. 42, 86 N.W. 768 (1901); State v. Layton, 160 Mo. 474, 61 S.W. 171 (1901); Beha v. State, 67 Neb. 27, 93 N.W. 155 (1903); People v. Spencer, 201 N.Y. 105, 94 N.E. 614 (1911); Commonwealth v. Kevin, 202 Pa. 23, 51 A. 594 (1902).

[2] National Pork Producers Council v. Bergland, 631 F.2d 1353 (8th Cir. 1980); Tennessee Valley Ham Co., Inc. v. Bergland, 493 F. Supp. 1007 (W.D. Tenn. 1980).

[3] General Foods Corp. v. Priddle, 569 F. Supp. 1378 (D. Kan. 1983); Aeration Processes, Inc. v. Commissioner of Public Health, 346 Mass. 546, 194 N.E.2d 838 (1963); State v. Hanson, 84 Minn. 42, 86 N.W. 768 (1901); Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).

[4] State v. Hanson, 84 Minn. 42, 86 N.W. 768 (1901); Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).

[5] 21 C.F.R. § 101.3(e)(1).

[6] Grocery Mfrs. of America, Inc. v. Gerace, 755 F.2d 993, 79 A.L.R. Fed. 157 (2d Cir. 1985), judgment aff'd, 474 U.S. 801, 106 S. Ct. 36, 88 L. Ed. 2d 29 (1985).

[7] Grocery Mfrs. of America, Inc. v. Gerace, 755 F.2d 993, 79 A.L.R. Fed. 157 (2d Cir. 1985), judgment aff'd, 474 U.S. 801, 106 S. Ct. 36, 88 L. Ed. 2d 29 (1985).

[8] Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228 (11th Cir. 2017) (applying Florida law).

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II. Regulation

D. Matters of Regulation

1. In General

§ 17. Food regulations concerning organic food

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 1.7

A.L.R. Library

Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

Congress has enacted the Organic Food Production Act.[1] The purpose of the Act is to establish national standards governing the marketing of certain agricultural products as organically produced products; to assure consumers that organically produced products meet a consistent standard; and to facilitate interstate commerce in fresh and processed food that is organically produced.[2] The Act established an organic certification program for producers and handlers of agricultural products that have been produced using organic methods.[3]

A state may establish its own organic certification program, subject to the approval of the Secretary of Agriculture. Such program may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced than are contained

in the federal program.[4]

In the case of a food certified under the national organic program, the certification will be considered sufficient to make a claim regarding the absence of bioengineering in the food, such as "not bioengineered," "non-GMO," or another similar claim.[5]

Consumers' state law claims against a grocery store, alleging that its products were falsely labeled as being organic, natural, and/or genetically modified organism (GMO) free, were not impliedly preempted by the Organic Foods Production Act (OFPA), since the OFPA did not indicate a clear and manifest purpose to occupy the field of the sale of food products, nor did it conflict with relevant state law.[6]

Footnotes

1 7 U.S.C.A. §§ 6501 to 6504.

2 7 U.S.C.A. § 6501.
Plaintiff's suit alleging that organic food regulations which govern, among other things, the labeling of organic products, were inconsistent with the Organic Foods Production Act (OFPA) satisfied prudential standing requirement; Congress enacted OFPA to establish national standards governing the marketing of organic products, to assure consumers that organic products meet these standards, and to facilitate interstate commerce in organic products, and plaintiff's alleged injuries fell precisely within the zone of interests that OFPA was meant to protect. Harvey v. Veneman, 396 F.3d 28 (1st Cir. 2005).

3 7 U.S.C.A. § 6503.
As to labeling requirements for organic food, see § 24.

4 7 U.S.C.A. § 6507(a), (b).

5 7 U.S.C.A. § 6524.

6 Gedalia v. Whole Foods Market Services, Inc., 53 F. Supp. 3d 943 (S.D. Tex. 2014).

35A Am. Jur. 2d Food § 18

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II. Regulation

D. Matters of Regulation

2. Quality

§ 18. Food quality standards, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 5

A.L.R. Library

Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

Forms

Am. Jur. Legal Forms 2d § 120:11 (Compliance with standards of quality—State standards)

The legislature may establish standards of food quality and prohibit the sale of substandard articles as unwholesome.[1] Such legislation must apply reasonable standards of purity; a standard of purity which practically prohibits the manufacture or sale

of that which, as a matter of common knowledge, is good and wholesome is improper.[2] Provisions authorizing the establishment of definitions and standards for food are justified by the necessity of protecting the consumer against trade practices that render the average consumer unable to judge properly the quality of a food product even if it is correctly labeled.[3] The producer's rights are, however, protected against unfair or unreasonable interference with their business activities.[4]

In some jurisdictions, local health districts are granted regulatory control over foodstuffs in places where they are sold to provide for the public health, prevention of disease and the abatement of nuisances.[5]

The Poultry Products Inspection Act,[6] and the Federal Meat Inspection Act,[7] expressly preempt the states from placing any additional or different requirements on the producers of those products other than those established by the federal government.[8] However, states may adopt standards for foods for which no federal standard has been established; such standards must conform with federal standards, tolerances, and definitions but need not conform with any other kind of federal rule or regulation, including exemptions from tolerances.[9]

The Secretary of Agriculture's decisions with respect to food processing standards are presumed reviewable under the Administrative Procedure Act.[10] Thus, regulations promulgated by the United States Department of Agriculture prescribing certain processing standards that must be complied with by food producers may be reviewed to determine whether they are rationally supported by the record.[11]

Standards have been enacted related to standards for produce safety, and requiring rulemaking and regulations to establish science-based minimum standards for the safe production and harvesting of fruits and vegetables,[12] concerning protection against intentional adulteration,[13] concerning the targeting of inspection resources for domestic and foreign facilities and ports of entry,[14] concerning laboratory accreditation for analyses of foods,[15] concerning mandatory recall authority,[16] and concerning a required annual report for Congress.[17]

Footnotes

1 People v. Biesecker, 169 N.Y. 53, 61 N.E. 990 (1901); American Linseed Oil Co. v. Wheaton, 25 S.D. 60, 125 N.W. 127 (1910).

2 People v. Biesecker, 169 N.Y. 53, 61 N.E. 990 (1901).

3 Federal Security Adm'r v. Quaker Oats Co., 318 U.S. 218, 63 S. Ct. 589, 87 L. Ed. 724, 158 A.L.R. 832 (1943).
As to the federal regulations concerning particular food standards, see 21 C.F.R. Pt. 130.

4 U.S. v. Lord-Mott Co., 57 F. Supp. 128 (D. Md. 1944).

5 Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991).

6 21 U.S.C.A. §§ 451 to 472.

7 21 U.S.C.A. §§ 601 to 695.

8 National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994); Boulahanis v. Prevo's Family Market, Inc., 230 Mich. App. 131, 583 N.W.2d 509 (1998).

9 American Grain Products Processing Institute v. Department of Public Health, 392 Mass. 309, 467 N.E.2d 455 (1984); Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991).

10 Kenney v. Glickman, 96 F.3d 1118 (8th Cir. 1996).

11 Formula v. Heckler, 779 F.2d 743 (D.C. Cir. 1985); Tennessee Valley Ham Co., Inc. v. Bergland, 493 F. Supp. 1007 (W.D. Tenn. 1980).

12 21 U.S.C.A. § 350h.

13 21 U.S.C.A. § 350i.

14 21 U.S.C.A. § 350j.

15 21 U.S.C.A. § 350k.

16 21 U.S.C.A. § 350*l*.

17 21 U.S.C.A. § 350*l*-1.

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35A Am. Jur. 2d Food § 19

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II. Regulation

D. Matters of Regulation

2. Quality

§ 19. Food regulations concerning contamination

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 5

The purpose of a statute prohibiting food from being held in unsanitary conditions when it may become contaminated is to safeguard the consumer from the time the food is introduced in interstate commerce until it is delivered to the ultimate consumer.[1] When insanitary conditions are adjacent to food there exists a reasonable possibility that the food may become contaminated within the meaning of the Food, Drug, and Cosmetic Act.[2] The Act does not require actual contamination of food for it to be considered adulterated but, rather, only its exposure to conditions that may result in contamination.[3] That is, actual contamination is not required under the FDCA's prohibition of introduction or delivery for introduction into interstate commerce of food that is adulterated. It is sufficient that there exists a reasonable possibility of contamination.[4] "Filth," as that term is used in the Food, Drug, and Cosmetic Act is given its common meaning, and thus is defined as foul matter, offensive or disgusting.[5]

State and municipal subdivisions may enact their own regulations to protect the public health which prohibit food from being held in unsanitary conditions where it may become contaminated.[6] Such legislation protects food from contamination by contact with flies,[7] or rodents, birds, or insects.[8]

The Sanitary Food Transportation Act, prohibits certain food transportation practices, provides for regulations by the Secretary of Transportation to safeguard food and certain other products from contamination during motor or rail transportation, provides for inspections, and provides civil and criminal penalties for violations.[9]

Footnotes

[1] U. S. v. J. Treffiletti & Sons, 496 F. Supp. 53 (N.D. N.Y. 1980).

[2] U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1205 (E.D. N.Y. 1984), referring to 21 U.S.C.A. § 342(a), discussed in § 20.

[3] U.S. v. King's Trading, Inc., 724 F.2d 631, 14 Fed. R. Evid. Serv. 814 (8th Cir. 1983).

[4] U.S. v. Chung's Products LP, 941 F. Supp. 2d 770 (S.D. Tex. 2013).

[5] U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1205 (E.D. N.Y. 1984), referring to its use in 21 U.S.C.A. § 342(a), discussed in § 20.

[6] Com., Dept. for Human Resources v. Kentucky Products, Inc., 616 S.W.2d 496 (Ky. 1981); Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991).

[7] Barrett v. Rietta, 207 Ala. 651, 93 So. 636 (1922); Territory v. Hop Kee, 21 Haw. 206, 1912 WL 1656 (1912); Southern Shell Fish Co., Inc. v. Office of Public Health, Dept. of Health and Hospitals, 703 So. 2d 1321 (La. Ct. App. 1st Cir. 1997); Ex parte Bacigalupo, 115 Minn. 339, 132 N.W. 303 (1911); State v. Normand, 76 N.H. 541, 85 A. 899 (1913); Caputo v. Barber, 76 A.D.2d 1029, 429 N.Y.S.2d 476 (3d Dep't 1980); Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991).

[8] U.S. v. Wiesenfeld Warehouse Co., 376 U.S. 86, 84 S. Ct. 559, 11 L. Ed. 2d 536 (1964).

[9] 49 U.S.C.A. § 5701.

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D. Matters of Regulation

2. Quality

§ 20. Food regulations concerning adulteration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 5

A.L.R. Library

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129

Construction and application of Federal Food, Drug, and Cosmetic Act sec. 402(a)(3) (21 USC sec. 342(a)(3)) as to food deemed "adulterated," if it is filthy or the like, or unfit for food, 45 A.L.R.2d 861

Forms

Am. Jur. Legal Forms 2d § 120:17 (Warranty against adulteration or misbranding of food)

A state may use its police power to protect the health, comfort, and safety of its citizens by prohibiting the sale of impure and adulterated food and by fixing the standards which such articles of food must meet.[1] Reasonable regulations of this kind do not violate the Due Process Clauses of State and Federal Constitutions, and are not repugnant to the Commerce Clause of the Federal Constitution, if they operate within the borders of the state.[2]

Under the Federal Food, Drug, and Cosmetic Act, a food shall be deemed to be adulterated if (1) any valuable constituent has been in whole or in part omitted or abstracted therefrom, or (2) if any substance has been substituted wholly or in part therefor, or (3) if damage or inferiority has been concealed in any manner, or (4) if any substance has been added thereto or

mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.[3] To establish that food is "adulterated," within meaning of the Food, Drug, and Cosmetic Act, it is not necessary to prove that the food itself actually contains filth or is injurious to health. On the contrary, the government need only show a reasonable probability that, because of the insanitary conditions under which food is prepared, packed, or held, food may have been rendered filthy or injurious to health.[4] In addition, a food is considered adulterated when it fails to meet the standard set by law as to its ingredients,[5] if it is otherwise unfit for food,[6] or when any foreign substance, wholesome or unwholesome, is added to it.[7] A food will also be considered adulterated:[8]

(1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health;

(2) (A) if it bears or contains any added poisonous or added deleterious substance (other than a substance that is a pesticide chemical residue in or on a raw agricultural commodity or processed food, a food additive, a color additive, or a new animal drug) that is unsafe; or (B) if it bears or contains a pesticide chemical residue that is unsafe; or (C) if it is or if it bears or contains (i) any food additive that is unsafe, or (ii) a new animal drug (or conversion product thereof) that is unsafe; or

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; or

(5) if it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or

(6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or

(7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect.

Food is also considered adulterated when it contains a poisonous or deleterious preservative,[9] or when it accidentally contains a filthy or decomposed substance.[10]

In addition, food is considered adulterated if it: presents a significant or unreasonable risk of illness or injury under conditions of use recommended or suggested in labeling, or if no conditions of use are suggested or recommended in the labeling, under ordinary conditions of use; is a new dietary ingredient for which there is inadequate information to provide reasonable assurance that such ingredient does not present a significant or unreasonable risk of illness or injury; the Secretary of Health and Human Services declares it to pose an imminent hazard to public health or safety; or is or contains a dietary ingredient that renders it adulterated under the conditions of use recommended or suggested in the labeling of such dietary supplement.[11]

Federal Regulations, under the heading "Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food," provides the criteria to determine whether a food has been manufactured under such conditions that it is unfit for food, or that the food has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.[12] Additional federal regulations, under the heading "Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption,"[13] provide that a farm or farm mixed-type facility with an average annual monetary value of produce[14] sold during the previous three-year period of more than $25,000[15] must take appropriate measures to minimize the risk of serious adverse health consequences or death from the use of, or exposure to, covered produce, including those measures reasonably necessary to prevent the introduction of known or reasonably foreseeable hazards into covered produce, and to provide reasonable assurances that the produce is not adulterated.[16]

There is a de minimis exception to the enforcement of the Food, Drug, and Cosmetic Act which allows a court to overlook small quantities of filth, especially in circumstances when no applicable industry guideline is in effect and there is no evidence that that the quantity found is avoidable through the use of good manufacturing practice, taking into account the

state of the industry.[17]

Footnotes

1 State v. Schlenker, 112 Iowa 642, 84 N.W. 698 (1900); Commonwealth v. Boston White Cross Milk Co., 209 Mass. 30, 95 N.E. 85 (1911); State v. Hanson, 84 Minn. 42, 86 N.W. 768 (1901); City of St. Louis v. Schuler, 190 Mo. 524, 89 S.W. 621 (1905); Crossman v. Lurman, 171 N.Y. 329, 63 N.E. 1097 (1902), aff'd, 192 U.S. 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912); Hill v. Commonwealth, 47 Va. App. 442, 624 S.E.2d 666 (2006).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

2 People v. Price, 257 Ill. 587, 101 N.E. 196 (1913), aff'd, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915).

3 21 U.S.C.A. § 342(b).

4 United States v. Scotty's Inc., 173 F. Supp. 3d 549 (E.D. Mich. 2016).

5 American Linseed Oil Co. v. Wheaton, 25 S.D. 60, 125 N.W. 127 (1910).

6 U.S. v. 71/55 Gallon Drums, More or Less, of Stuffed Green Olives in Brine, an Article of Food, 790 F. Supp. 1379 (N.D. Ill. 1992).
Beef contaminated by E. coli bacteria was "adulterated" under Federal Meat Inspection Act, even though the meat left meat processing facility as intact cuts. Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc., 2003 WI App 119, 265 Wis. 2d 476, 665 N.W.2d 417 (Ct. App. 2003).

7 U.S. v. Anderson Seafoods, Inc., 622 F.2d 157 (5th Cir. 1980); U.S. v. Boston Farm Center, Inc., 590 F.2d 149 (5th Cir. 1979); U.S. v. An Article of Food Consisting of Cartons of Swordfish, 395 F. Supp. 1184 (S.D. N.Y. 1975); Pierre Viaus Maple Co. v. Bird, 154 Mich. 73, 117 N.W. 553 (1908).
Raw oysters that contained the bacteria vibrio vulnificus and that were sold by restaurant to patrons were not "adulterated," for purposes of State Pure Food and Drug Law; vibrio was not an added substance, but rather occurred naturally, vibrio had minimal impact on general population, and vibrio was deadly only to those with weakened immune systems or stomach disorders. Woeste v. Washington Platform Saloon & Restaurant, 163 Ohio App. 3d 70, 2005-Ohio-4694, 836 N.E.2d 52 (1st Dist. Hamilton County 2005).

8 21 U.S.C.A. § 342(a)(1).

9 § 22.

10 U.S. v. 449 Cases Containing "Tomato Paste", 212 F.2d 567, 45 A.L.R.2d 846 (2d Cir. 1954); Salamonie Packing Co. v. United States, 165 F.2d 205 (C.C.A. 8th Cir. 1948); Triangle Candy Co. v. U.S., 144 F.2d 195, 155 A.L.R. 903 (C.C.A. 9th Cir. 1944); T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour, 449 F. Supp. 84 (S.D. Ala. 1976), judgment aff'd in part, rev'd in part on other grounds, 629 F.2d 338, 7 Fed. R. Evid. Serv. 1336, 30 Fed. R. Serv. 2d 661, 30 U.C.C. Rep. Serv. 865 (5th Cir. 1980); U.S. v. General Foods Corp., 446 F. Supp. 740 (N.D. N.Y. 1978), aff'd, 591 F.2d 1332 (2d Cir. 1978); Com., Dept. for Human Resources v. Kentucky Products, Inc., 616 S.W.2d 496 (Ky. 1981).

11 21 U.S.C.A. § 342(f).

12 21 C.F.R. §§ 117.1 to 117.475.

13 21 C.F.R. §§ 112.1 to 112.213.

14 21 C.F.R. § 112.3.

15 21 C.F.R. § 112.4.

16 21 C.F.R. § 112.11.

[17] Clover Leaf Dairy v. State, 285 Mont. 380, 948 P.2d 1164 (1997); Commonwealth v. Kevin, 202 Pa. 23, 51 A. 594 (1902).

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II. Regulation

D. Matters of Regulation

2. Quality

§ 21. Food regulations concerning adulteration—Coloring or flavoring as adulterant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 5

A.L.R. Library

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129

Validity, construction, and application of color additive provisions of Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C.A. secs. 321(t, u), 362(a, e), 376), and of implementing regulations, 12 A.L.R. Fed. 475

Forms

Federal Procedural Forms § 31:98 (Certification of color additives)

Adding artificial color to a food product to make it appear better than or different from what it actually is amounts to an adulteration.[1] Pursuant to the Federal Food, Drug, and Cosmetic Act, a food is deemed to be adulterated if it is, or it bears or contains, a color additive which is unsafe within the meaning of the statute governing the listing and certification of color additives.[2] Statutes forbidding the artificial coloring of certain foods are a lawful exercise of the police power of the state.[3]

In some jurisdictions, the statutes forbid the use of color to make an article of food appear better than it actually is,[4] and that the coloring matter is entirely harmless is immaterial.[5] In others, however, when the coloring matter is used to make food more attractive or appealing to the eye, but is not deceptive or detrimental to health, there is no adulteration.[6]

If the coloring matter is poisonous, its addition is an adulteration.[7]

Footnotes

1 U. S. v. 36 Drums of Pop'n Oil, 164 F.2d 250 (C.C.A. 5th Cir. 1947); State v. Armour Packing Co., 124 Iowa 323, 100 N.W. 59 (1904); State v. Rogers, 95 Me. 94, 49 A. 564 (1901); Beha v. State, 67 Neb. 27, 93 N.W. 155 (1903).

2 21 U.S.C.A. § 342(c), referring to 21 U.S.C.A. § 379e(a).

3 State v. Kerndt, 274 Wis. 113, 79 N.W.2d 113 (1956).

4 Com. v. Di Meglio, 385 Pa. 119, 122 A.2d 77, 56 A.L.R.2d 1120 (1956).

5 People v. Hinshaw, 135 Mich. 378, 97 N.W. 758 (1904); State v. Kerndt, 274 Wis. 113, 79 N.W.2d 113 (1956).

6 French Silver Dragee Co. v. U. S., 179 F. 824 (C.C.A. 2d Cir. 1910); Com. v. Di Meglio, 385 Pa. 119, 122 A.2d 77, 56 A.L.R.2d 1120 (1956).

7 Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S. Ct. 160, 3 L. Ed. 2d 188 (1958).

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II. Regulation

D. Matters of Regulation

2. Quality

§ 22. Food regulations concerning adulteration—Preservative as adulterant

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 5

An ingredient in food may be characterized as an adulterant even if its purpose and principal effect are preservative and it is not injurious or deleterious to health.[1] The legislature or governing body may constitutionally prohibit the sale of food products to which unwholesome or injurious preservatives are added.[2] The use of harmless substances as preservatives, such as common salt and various forms of sugar, are generally permissible under the exemptions granted by some statutes.[3] However, if an article of food contains preservatives which must be listed on the label, and those ingredients are not named in a proposed label under consideration by the Food and Drug Administration, it may refuse to approve the proposed label.[4]

Regulations regarding food preservatives will be sustained unless they are arbitrary or without a reasonable relation to the public health or the prevention of fraud, and statutes which forbid the manufacture, offer for sale, or sale of any unwholesome or injurious food preservative, mixture, or compound do not violate due process.[5]

The prohibition of the use of certain food preservatives is not invalid as unreasonable when the wholesomeness of the preservatives is in dispute.[6] However, ingredients and processes used in preserving food cannot be prohibited solely because they preserve.[7]

Footnotes

1 Barron County Canning & Pickle Co. v. Niana Pure Food Co., 191 Wis. 635, 211 N.W. 764, 50 A.L.R. 69 (1927).

2 Curtice Bros. Co. v. Barnard, 209 F. 589 (C.C.A. 7th Cir. 1913); U.S. v. Articles of Food. . . Buffalo Jerky, 456 F. Supp. 207 (D. Neb. 1978); People v. Quality Provision Co., 367 Ill. 610, 12 N.E.2d 615, 114 A.L.R. 1210 (1937); People v. Biesecker, 169 N.Y. 53, 61 N.E. 990 (1901); Commonwealth v. Kevin, 202 Pa. 23, 51 A. 594 (1902).

[3] Curtice Bros. Co. v. Barnard, 209 F. 589 (C.C.A. 7th Cir. 1913).

[4] U.S. v. An Article of Food Consisting of 126 Cases, More or Less, Each Containing 12 Three-Pound Jars, Labeled: (Case and Jar) Pure Raw Honey Packed For J.G. Samples, 550 F. Supp. 15 (W.D. Okla. 1982).

[5] Price v. People of State of Illinois, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915); People v. Quality Provision Co., 367 Ill. 610, 12 N.E.2d 615, 114 A.L.R. 1210 (1937); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).

[6] Price v. People of State of Illinois, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915).

[7] People v. Biesecker, 169 N.Y. 53, 61 N.E. 990 (1901).

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II. Regulation

D. Matters of Regulation

3. Labeling

§ 23. Food labeling standards, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 15

A.L.R. Library

Liability of Food Manufacturer Based on Statement in Product Labeling or Promotion Relating to, or Inconsistent with Presence of, Trans Fat in Product, 92 A.L.R.6th 141

Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Validity, under Commerce Clause (Art I, sec. 8, cl 3), of state statutes regulating labeling of food, 79 A.L.R. Fed. 246

Treatises and Practice Aids

Federal Procedure, L. Ed. §§ 35:119 to 35:121 (Petition for exemption from food labeling requirements)

Trial Strategy

Proof of Statutory Unfair Business Practice under State Law, 177 Am. Jur. Proof of Facts 3d 303

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

Forms

Am. Jur. Legal Forms 2d § 120:17 (Warranty against adulteration or misbranding of food)
Am. Jur. Pleading and Practice Forms, Food § 3 (Complaint, petition or declaration—For declaratory judgment and injunction—To declare statute prohibiting sale of food in package or container of more or less than specific size, or weight unconstitutional and to enjoin enforcement)

Companies and people engaged in the food business have an affirmative duty to ensure that the food they sell to the public is safe and properly labeled.[1] Legislation requiring packages and containers of articles of food to bear labels, brands, or tags showing their contents or ingredients is an efficient way to protect the public from the sale of inferior and injurious articles, and is a legitimate exercise of the police power.[2] For example, the Federal Food, Drug and Cosmetic Act (FDCA) prohibits the misbranding of food and drink, and its statutory regime is designed primarily to protect the health and safety of the public at large.[3] Such legislation, however, must be reasonable in scope and sufficiently definite in its terms.[4] Moreover, such laws do not deprive the seller of property without due process of law, for no one has a constitutional right to keep secret the composition of substances sold to the public as articles of food.[5]

Similarly, statutes requiring the size, weight,[6] or quantity of food products to be expressed in the label or brand are within the legislative power.[7]

The enactment of a federal statute which prohibits the interstate transportation of foods misbranded or labeled so as to defraud or mislead the public[8] is a proper exercise of the power of Congress over interstate commerce.[9] The purposes of such legislation are to inform the purchasers of what they are buying,[10] and to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded foods.[11]

The Nutrition Labeling and Education Act requires national uniform nutrition labeling and prohibits the states from establishing, as to any food in interstate commerce subject to federal standards, any requirement that is not identical to the federal requirements.[12] Consistent with the statute's purpose of promoting uniform national labeling standards, the Nutrition Labeling and Education Act (NLEA) includes an express preemption provision that forbids the states from directly or indirectly establishing any requirement made in the labeling of food that is not identical to the federal labeling requirements established by certain specifically enumerated sections of the Federal Food, Drug, and Cosmetics Act (FDCA).[13] That is, in an effort to create uniformity amongst the states regarding labeling requirements, a preemption provision was included in the Nutritional Labeling and Education Act (NLEA) which prohibits states from requiring additional nutritional information beyond that required by the NLEA.[14] While the NLEA[15] does not regulate nutrition information labeling on restaurant food, and states and localities are free to adopt their own rules, the NLEA does generally regulate nutrition content claims on restaurant foods, and states and localities may only adopt rules that are identical to those provided in the NLEA.[16]

A restaurant's statement is nutrition information exempt from the NLEA preemption provisions if two criteria are met: first, the statement must be of the type required under the NLEA provision addressing mandatory information on nutrients, and appear as part of the nutrition information required or permitted by that provision; and second, a state or municipal regulatory authority must require the statement to be disclosed with regard to restaurant food as part of nutrition labeling, and the information must be disclosed pursuant to that authority.[17] Thus, a city law requiring certain restaurants to post calorie content information on their menus and menu boards was not preempted by the federal statutory scheme regulating labeling and branding of food, including the NLEA, in light of the statutory scheme and the presumption against preemption.[18] However, a consumer's state law claims against manufacturer of breakfast cereals based on manufacturer's statements regarding the benefits of fiber in its products were preempted by the Nutrition Labeling and Education Act (NLEA), where claims were premised on the notion that high sugar content of manufacturer's products made its health or implied nutrient content claims

misleading, and thus were preempted by the FDA's express decision to not recognize sugar as a disqualifying nutrient.[19] Moreover, the NLEA provision, prohibiting states from establishing any requirement for labeling of food that is not identical to the requirement of the Federal Food, Drug, and Cosmetic Act (FDCA), by negative implication allows states to establish their own requirements pertaining to the labeling of artificially colored food so long as their requirements are identical to those contained in the FDCA.[20]

A label is deemed to be misleading if it misrepresents the article in question in any way.[21]

Footnotes

1 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).

2 Corn Products Refining Co. v. Eddy, 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689 (1919); Hebe Co. v. Shaw, 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255 (1919); Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787 (3d Dist. 1925); State v. Sherod, 80 Minn. 446, 83 N.W. 417 (1900); Alcorn Cotton Oil Co. v. State, 100 Miss. 299, 56 So. 397 (1911); Ex parte Arrigo, 98 Neb. 134, 152 N.W. 319 (1915).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

3 Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

4 Dyson v. Miles Laboratories, Inc., 57 A.D.2d 197, 394 N.Y.S.2d 86 (3d Dep't 1977).

5 Corn Products Refining Co. v. Eddy, 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689 (1919); Hebe Co. v. Shaw, 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255 (1919).

6 Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

7 Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787 (3d Dist. 1925).

8 21 U.S.C.A. §§ 301 to 399i.

9 Weeks v. U.S., 245 U.S. 618, 38 S. Ct. 219, 62 L. Ed. 513 (1918); Seven Cases v. U.S., 239 U.S. 510, 36 S. Ct. 190, 60 L. Ed. 411 (1916).

10 U.S. v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar, 265 U.S. 438, 44 S. Ct. 529, 68 L. Ed. 1094 (1924); U.S. v. Schider, 246 U.S. 519, 38 S. Ct. 369, 62 L. Ed. 863 (1918); U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658 (1914).

11 U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658 (1914); U. S. v. Antikamnia Chemical Co., 231 U.S. 654, 34 S. Ct. 222, 58 L. Ed. 419 (1914); Hipolite Egg Co. v. U.S., 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911).

12 21 U.S.C.A. § 343-1.

13 Parks v. Ainsworth Pet Nutrition, LLC, 377 F. Supp. 3d 241 (S.D. N.Y. 2019).

14 Cohen v. McDonald's Corp., 347 Ill. App. 3d 627, 283 Ill. Dec. 451, 808 N.E.2d 1 (1st Dist. 2004).

15 21 U.S.C.A. § 343(q), (r), discussed further in § 25.

16 New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

17 New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

18 New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

19 Hadley v. Kellogg Sales Company, 273 F. Supp. 3d 1052 (N.D. Cal. 2017) (applying, in part, California law).

[20] Farm Raised Salmon Cases, 42 Cal. 4th 1077, 72 Cal. Rptr. 3d 112, 175 P.3d 1170 (2008).

[21] U.S. v. Aangamik 15 Calcium Pangamate, 503 F. Supp. 925 (N.D. Ill. 1980), judgment aff'd, 678 F.2d 735 (7th Cir. 1982).

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II. Regulation

D. Matters of Regulation

3. Labeling

§ 24. Misbranding of food under federal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 15

A.L.R. Library

Construction and Application of Organic Foods Production Act (OFPA), 7 U.S.C.A. ss6501 et seq., and National Organic Program (NOP) Standards, 67 A.L.R. Fed. 2d 129

Trial Strategy

Crop Duster's Failure to Exercise Care in Spraying of Crops, 9 Am. Jur. Proof of Facts 2d 623

The misbranding provision of the Federal Meat Inspection Act,[1] stating that meat is misbranded "if its labeling is false or misleading in any particular," does not require that the false or misleading statements be "material."[2] The misbranding provision is not overly broad or vague, so as to violate due process, despite the lack of a materiality requirement, because the statute simply prohibits any false or misleading statements in meat labeling without limiting the prohibition to any particular types of false or misleading claims, and those in the food business may comply without difficulty, simply by not including any false or misleading statements in their meat labeling.[3] The Federal Meat Inspection Act (FMIA) provision allowing states to exercise concurrent jurisdiction with the United States Department of Agriculture (USDA) over beef labeling consistent with the requirements set forth under the FMIA authorized states to undertake enforcement of federal requirements, but did not grant states authority to impose different labeling requirements.[4]

Official establishments must notify the local Food Safety and Inspection Service District Office within 24 hours of learning or determining that an adulterated or misbranded meat, meat food, poultry, or poultry product received by or originating from the establishment has entered commerce, if the establishment believes or has reason to believe that this has happened.[5] Each establishment must also prepare and maintain written procedures for the recall of any meat, meat food, poultry, or poultry product produced and shipped by the establishment.[6]

The Fair Packaging and Labeling Act[7] enables consumers of packaged "consumer commodities" to obtain accurate information as to the quantity of the contents to facilitate value comparisons,[8] by requiring that consumer commodities bear a label specifying the identity of the commodity, and the name and place of business of the manufacturer, packer, or distributor of the commodity.[9] The label must also contain the net quantity of the contents, using the most appropriate customary inch/pound system of measurement.[10] The term "consumer commodity" includes, but is not limited to, "food" as that term is defined in the Food, Drug, and Cosmetic Act,[11] but expressly excludes any meat or meat product or poultry or poultry product.[12] The purpose of the law is to avoid the misbranding of food and to inform consumers of the actual characteristics and properties of food products.[13]

Under the Organic Foods Production Act[14] to be sold or labeled as an organically produced agricultural product, an agricultural product must:[15]

(1) have been produced and handled without the use of synthetic chemicals, except as otherwise provided in the Act;

(2) except as otherwise provided in the Act and excluding livestock, not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the three years immediately preceding the harvest of the agricultural products; and

(3) be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.

A person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with the Act, and no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with the Act.[16] Certain exemptions are provided for processed food[17] and small farmers.[18]

Notwithstanding the requirement that products be produced only on certified organic farms, the Secretary of Agriculture must allow, through regulations promulgated after public notice and opportunity for comment, wild seafood to be certified or labeled as organic.[19]

Footnotes

1 21 U.S.C.A. § 601(n)(1).

2 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).

3 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).

4 Thornton v. Tyson Foods, Inc., 2020 WL 5076083 (D.N.M. 2020).

5 9 C.F.R. § 418.2.

6 9 C.F.R. § 418.3.

7 15 U.S.C.A. §§ 1451 to 1461.

8 15 U.S.C.A. § 1451.

9 15 U.S.C.A. § 1453(a)(1).

10 15 U.S.C.A. § 1453(a)(2).

11 15 U.S.C.A. § 1459(a).

12 15 U.S.C.A. § 1459(a)(1).

13 Lever Bros. Co. v. Maurer, 712 F. Supp. 645 (S.D. Ohio 1989).

14 7 U.S.C.A. §§ 6501 to 6504, discussed generally in § 17.

15 7 U.S.C.A. § 6504.

16 7 U.S.C.A. § 6505(a)(1).

17 7 U.S.C.A. § 6505(c).

18 7 U.S.C.A. § 6505(d).

19 7 U.S.C.A. § 6506(c)(1).
The regulations promulgated by the Department of Agriculture are located at 7 C.F.R. §§ 205.1 to 205.681.

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35A Am. Jur. 2d Food § 25

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II. Regulation

D. Matters of Regulation

3. Labeling

§ 25. Misbranding of food under federal statutes—Food, Drug, and Cosmetic Act

Topic Summary | Correlation Table | References

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Forms

Am. Jur. Legal Forms 2d § 120:18 (Indemnity of seller against liability for misbranding of goods shipped under buyer's labels)
Federal Procedural Forms § 31:97 (Listing of color additives)

The Food, Drug, and Cosmetic Act[1] keeps interstate channels free from misbranded articles of specified types, to advance the public health and safety[2] and protects the public from inferior foods resembling standard products but marketed under distinctive names.[3] The statute covers both affirmative misrepresentations and material omissions.[4]

The Act provides, in part, that an article is deemed misbranded if—
— its labeling is false or misleading in any particular.[5]
— it is offered for sale under the name of another food.[6]
— it is an imitation of another food without being so labeled.[7]
— its container is so made, formed, or filled as to be misleading.[8]
— it contains any artificial flavoring, artificial coloring, or chemical preservative, unless so labeled.[9]
Under the statutory provision deeming a food to be misbranded unless the label bears the "common or usual name" of the product,[10] it is unnecessary to show that anyone was actually misled or deceived by the omission or that there was an intent to deceive.[11] Federal regulation instructing that the name of each ingredient listed on a food label shall be a specific name and not a collective generic name does not override FDCA requirement that ingredients be listed by their "common or usual names," but instead clarifies that ingredients must be listed separately rather than as a single generic category.[12]

Under the Act's provisions covering misbranded dietary supplements, a dietary supplement is not misbranded solely because its label or labeling contains directions or conditions of use, or warnings.[13] However, a dietary supplement that is marketed in the United States, will be deemed to be misbranded unless the label of such dietary supplement includes a domestic address or domestic phone number through which reports of a serious adverse event with such dietary supplement may be received.[14]

A food will be considered misbranded if it characterizes the level of any nutrient or characterizes the relationship of any nutrient to a disease or health-related condition unless the claim is made in accordance with certain requirements. Thus, claims relating to cholesterol, saturated fat, and dietary fiber must meet certain requirements.[15]

A food will also be considered misbranded if it is not a raw agricultural commodity and it is, or it contains an ingredient that bears or contains, a major food allergen, unless certain requirements are met.[16] In addition, a food will be considered misbranded if it fails to bear a label required by statute, the Secretary of Health and Human Services finds that the food presents a threat of serious adverse health consequences or death to humans or animals, and upon or after notifying the owner or consignee involved that the statutory label is required, the Secretary informs the owner or consignee that the food presents such a threat.[17]

The labels of food containers must include specific nutrition information, including the total number of calories derived from any source and derived from total fat, the amounts of specified nutrients, vitamins, and minerals.[18] For example, the operator of a grocery store was not exempt from the labeling requirements of the Food Drug and Cosmetic Act (FDCA) or Food Allergen Labeling and Consumer Protection Act (FALCPA) for food served for immediate human consumption, and thus a customer, whose child had a severe allergic reaction after eating an improperly labeled vegan pizza that contained nuts, could bring a claim for the misbranding of food for consumption. The customer did not allege that the pizza was ready to eat, and the customer claimed to have purchased pizzas from the grocery store in the past for consumption "off site."[19] Moreover, in the case of standard menu items, restaurants and other retail food establishments must disclose nutrient information as well as information on suggested daily caloric intake. Specifically, a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name must disclose (certain foods excepted) calories on the menu board and in a written form, available to customers upon request, additional nutrient information pertaining to total calories and calories from fat, as well as amounts of fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and protein. Failure to do so constitutes misbranding.[20]

The Food, Drug, and Cosmetic Act (FDCA) does not preclude a private party from bringing a Lanham Act claim challenging as misleading a food label that is regulated by the FDCA.[21]

Footnotes

1 21 U.S.C.A. §§ 301 to 399i.

2 U.S. v. 40 Cases, More or Less of Pinocchio Brand 75% Corn, Peanut Oil and Soya Bean Oil Blended with 25% Pure Olive Oil, 289 F.2d 343 (2d Cir. 1961); Carnohan v. U.S., 616 F.2d 1120 (9th Cir. 1980); U.S. v. Aangamik 15 Calcium Pangamate, 503 F. Supp. 925 (N.D. Ill. 1980), judgment aff'd, 678 F.2d 735 (7th Cir. 1982); State v. Deputy, 644 A.2d 411 (Del. Super. Ct. 1994), judgment aff'd, 648 A.2d 423 (Del. 1994).
The Food, Drug, and Cosmetic Act (FDCA) was enacted to enable purchasers to make intelligent choices, and, to that end, misbranding was one of the chief evils Congress sought to stop. U.S. v. Watkins, 278 F.3d 961 (9th Cir. 2002).

3 62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S., 340 U.S. 593, 71 S. Ct. 515, 95 L. Ed. 566 (1951).
Allegations in a consumer's complaint, that the producer of almond beverages had marketed these beverages as "almond milk" and thereby suggested that they were a substitute for dairy milk, despite the fact that they were nutritionally inferior to dairy milk, did not state a plausible claim for mislabeling in violation of federal law; almond milk was not an "imitation" of, or "substitute" for, dairy milk, and a reasonable jury could not conclude that almond milk was "nutritionally inferior" to dairy milk within the meaning of the federal regulation, as two distinct food products necessarily have different nutritional profiles. Painter v. Blue Diamond Growers, 757 Fed. Appx. 517 (9th Cir. 2018).

4 U.S. v. Hanafy, 302 F.3d 485 (5th Cir. 2002).

[5] 21 U.S.C.A. § 343(a).
"Misbranding" under the Food, Drug, and Cosmetic Act (FDCA) does not require a false label; a misleading label is prohibited as well. U.S. v. Watkins, 278 F.3d 961 (9th Cir. 2002).

[6] 21 U.S.C.A. § 343(b).

[7] 21 U.S.C.A. § 343(c).

[8] 21 U.S.C.A. § 343(d).

[9] 21 U.S.C.A. § 343(k).

[10] 21 U.S.C.A. § 343(i).

[11] U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992) (referring to 21 U.S.C.A. § 343(i)).

[12] Augustine v. Talking Rain Beverage Company, Inc., 386 F. Supp. 3d 1317 (S.D. Cal. 2019).

[13] 21 U.S.C.A. § 343(s).

[14] 21 U.S.C.A. § 343(y).

[15] 21 U.S.C.A. § 343(r).

[16] 21 U.S.C.A. § 343(w).

[17] 21 U.S.C.A. § 343(v).

[18] 21 U.S.C.A. § 343(q).

[19] Jones v. WFM-Wo, Inc., 265 F. Supp. 3d 775 (M.D. Tenn. 2017), referencing 21 U.S.C.A. § 343(q).

[20] 21 U.S.C.A. § 343(q)(5)(H).
As to restaurants, generally, see Am. Jur. 2d, Hotels, Motels, and Restaurants §§ 1 to 12.

[21] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014).

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35A Am. Jur. 2d Food § 26

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II. Regulation

D. Matters of Regulation

4. Additives

§ 26. Food regulations concerning additives, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

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Construction and application of food additives provisions of Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. secs. 321(s), 321(u), 342(a)(2)(c), and 348), 21 A.L.R. Fed. 314

Treatises and Practice Aids

Federal Procedure, L. Ed. §§ 35:144 to 35:155 (Regulation of food additives)

Forms

Am. Jur. Pleading and Practice Forms, Food § 4 (Complaint, petition or declaration—Allegation—To enjoin enforcement of statute declaring that use of certain ingredient constitutes adulteration of beverage—Violation of due process clause of 14th Amendment)
Am. Jur. Pleading and Practice Forms, Food § 5 (Complaint, petition or declaration—Allegation—To enjoin enforcement of statute prohibiting use of particular food additive—Food additive beneficial and does not constitute adulteration)

Statutes governing food additives protect consumers against the introduction of untested and potentially unsafe substances in food, such as flavor, texture, or preservative agents.[1] Generally, a food additive is a component of a food that has the purpose or effect of altering the food's characteristics,[2] even if the component is the principal component or ingredient sought when the particular food is purchased.[3]

Whether a substance is a food additive depends on how the vendor intends the substance to be used, not on any inherent properties of the substance.[4] Only a component which, when added to a food, effects, or is expected to effect, some change in the food, rather than a component of a multicomponent substance, active or inactive, is a food additive.[5] That a particular substance is a principal ingredient of a food to which it is added does not preclude it from becoming a food additive for the purpose of determining whether the food is adulterated.[6]

The Food, Drug, and Cosmetic Act prohibits all food additives which cause cancer, regardless of the degree of risk involved.[7] By law, the Food and Drug Administration must make the determination as to whether a color additive has been found or not been found to be safe when ingested by a human or animal, and a manufacturer cannot include a food additive that poses a risk of inducing cancer in humans or animals.[8]

Potassium nitrate is a food additive when it is added to beverages, and its addition renders the food adulterated, because no regulation authorizes its use in beverages.[9]

A federal statute prohibits the introduction or delivery for introduction into interstate commerce of any food to which has been added an approved drug, a licensed biological product or a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, unless certain conditions are met.[10]

A consumer who alleged that she purchased a manufacturer's bread crumbs that she would not have otherwise bought if the consumer had known that the product was harmful since it contained trans fats as a food additive had standing to bring "use claims" under state law, alleging that it was illegal to include trans fat in products since it was not fit for human consumption and was an unlawful food additive.[11]

Footnotes

1 U.S. v. 29 Cartons of * * * An Article of Food, 987 F.2d 33 (1st Cir. 1993).
As to the federal regulations concerning food additives, see 21 C.F.R. Pt. 170.

2 U.S. v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039, 984 F.2d 814 (7th Cir. 1993); U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992); U.S. v. 29 Cartons, More or Less, of an Article of Food, 792 F. Supp. 139 (D. Mass. 1992), aff'd, 987 F.2d 33 (1st Cir. 1993); U.S. v. Articles of Food. . . Buffalo Jerky, 456 F. Supp. 207 (D. Neb. 1978).

3 U.S. v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039, 984 F.2d 814 (7th Cir. 1993); U.S. v. An Article of Food, 678 F.2d 735 (7th Cir. 1982).

4 U.S. v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039, 791 F. Supp. 751 (C.D. Ill. 1991), judgment aff'd, 984 F.2d 814 (7th Cir. 1993).

5 U.S. v. 29 Cartons of * * * An Article of Food, 987 F.2d 33 (1st Cir. 1993).

6 U.S. v. An Article of Food, 678 F.2d 735 (7th Cir. 1982).

[7] Les v. Reilly, 968 F.2d 985 (9th Cir. 1992).

[8] Riva v. Pepsico, Inc., 82 F. Supp. 3d 1045 (N.D. Cal. 2015).

[9] U.S. v. An Article of Food, 752 F.2d 11 (1st Cir. 1985).

[10] 21 U.S.C.A. § 331(ll).
The relevant time period for determining whether a product is safe is when the product is introduced into or is in interstate commerce or while it is held for sale; new information obtained on the safe use of the substance following the seizure of a food containing it is irrelevant. U.S. v. 21 Approximately 180 Kg. Bulk Metal Drums, More or Less, of an Article of Food and Drug, 761 F. Supp. 180 (D. Me. 1991).

[11] Hawkins v. Kroger Company, 906 F.3d 763 (9th Cir. 2018) (applying California law).

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4. Additives

§ 27. Food safety requirements related to additives

Topic Summary | Correlation Table | References

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A food additive is presumed unsafe unless the Secretary of Health and Human Services promulgates regulations prescribing the conditions under which it may be safely used or providing for its investigational use by qualified experts.[1]

The burden of proving the general recognition of the safe use of a food substance, such that it is not a food additive, is on the proponent of the food substance in question, to prove that the substance is generally recognized as safe.[2] To prove that a substance is generally recognized as safe, the proponent must submit evidence establishing that scientifically trained experts, qualified to evaluate the substance, believe it is generally recognized as safe, and show that there is scientific data establishing the safety of the substance for use as a food supplement.[3] Scientific studies supporting the finding that a food substance is generally recognized as safe and thus is not a food additive, must be collected and analyzed with regard to the substance's use as a dietary supplement, and the information offered must be generally available to a community of experts and subjected to peer evaluation, criticism, and review appropriate to establish its safety.[4]

Evidence of a genuine dispute among qualified experts as to the safety of the substance is sufficient to preclude a finding of general recognition of safe use.[5] A food processor's subjective determination of what constitutes "food" is not determinative of whether a particular substance is a "food" or a "food additive."[6] For example, artificially produced 1,3-dimethylamylamine (DMAA) for use in fitness products aimed at bodybuilders and other athletes was not generally recognized as safe and, therefore, was a "food additive" that the Food and Drug Administration (FDA) could treat as adulterated. Multiple sources, including in peer-reviewed publications, called into question DMAA's safety, DMAA could cause increases in blood pressure and hemorrhagic stroke and could inhibit activity of liver enzymes and cause liver toxicity, and its use had been associated with deaths.[7]

Experience based on the common foreign use of a substance in a food serves only as a means of showing safety; if the foreign experience does not clearly demonstrate the safety, because of doubts about cultural comparability or adequacy of public health data, then the substance will be deemed a food additive.[8]

Footnotes

[1] U.S. v. 29 Cartons of * * * An Article of Food, 987 F.2d 33 (1st Cir. 1993); U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992).

[2] U.S. v. Two Plastic Drums, More or Less of an Article of Food, Labeled in Part: Viponte Ltd. Black Currant Oil Batch No. BOOSF 039, 984 F.2d 814 (7th Cir. 1993); U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992); U.S. v. 29 Cartons, More or Less, of an Article of Food, 792 F. Supp. 139 (D. Mass. 1992), aff'd, 987 F.2d 33 (1st Cir. 1993).

[3] U.S. v. An Article of Food, 752 F.2d 11 (1st Cir. 1985); U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992); U.S. v. 21 Approximately 180 Kg. Bulk Metal Drums, More or Less, of an Article of Food and Drug, 761 F. Supp. 180 (D. Me. 1991).

[4] U.S. v. 45/194 Kg. Drums of Pure Vegetable Oil, 961 F.2d 808 (9th Cir. 1992).

[5] U.S. v. 21 Approximately 180 Kg. Bulk Metal Drums, More or Less, of an Article of Food and Drug, 761 F. Supp. 180 (D. Me. 1991).

[6] U.S. v. 29 Cartons of * * * An Article of Food, 987 F.2d 33 (1st Cir. 1993).

[7] United States v. Undetermined Quantities of All Articles of Finished and In-Process Foods, 936 F.3d 1341 (11th Cir. 2019), cert. denied, 2020 WL 6121597 (U.S. 2020).

[8] Fmali Herb, Inc. v. Heckler, 715 F.2d 1385 (9th Cir. 1983) (noting that evidence of the foreign use of an ingredient, standing alone, may rarely or never be enough evidence to establish the safety of its use in American foods).

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4. Additives

§ 28. Federal Food Additive Amendment

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The Food Additive Amendment of 1958 to the Food, Drug, and Cosmetic Act[1] provides that a food additive shall be deemed to be unsafe unless it and its intended use conform to the terms of an exemption; it and its intended use are in conformity with a regulation prescribing the conditions under which such additive may be safely used; or, in the case of a food contact substance, the substance and the use of such substance are in conformity with a regulation prescribing the conditions under which such additive may be safely used or a notification of the intended use and safety of such substance has been submitted to the Secretary of Health and Human Services.[2]

"Food contact substance" means any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.[3]

The statute only deals with intentional and incidental additives to foods and is inapplicable to accidental food additives.[4]

An "accidental additive" results from an event or conduct which is intended to have no effect upon a food or food ingredient and is not subject to preuse approval. For example, an additive picked up from the liner of a hot water tank is an indirect "food additive" when the hot water used as a food ingredient in the processing of baby food is intended to be in contact with the liner of the tank.[5]

Because accidental additives are not considered "food additives," they are subject to the general provisions of the Food, Drug, and Cosmetic Act prohibiting the addition of poisonous and deleterious substances to foods.[6]

Footnotes

[1] 21 U.S.C.A. § 348.

[2] 21 U.S.C.A. § 348(a).

[3] 21 U.S.C.A. § 348(h)(6).

[4] Natick Paperboard Corp. v. Weinberger, 525 F.2d 1103 (1st Cir. 1975); Burke Pest Control, Inc. v. Joseph Schlitz Brewing Co., 438 So. 2d 95 (Fla. 2d DCA 1983).

[5] Gerber Products Co. v. Fisher Tank Co., 833 F.2d 505 (4th Cir. 1987).

[6] Gerber Products Co. v. Fisher Tank Co., 833 F.2d 505 (4th Cir. 1987).

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Research References

West's Key Number Digest

West's Key Number Digest, Food 2, 3, 4.5(1) to 4.5(4), 6, 8

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A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food and Drug Administration (FDA)
A.L.R. Index, Poisons
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35A Am. Jur. 2d Food § 29

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II. Regulation

E. Particular Foods

1. In General

§ 29. Food regulations related to bread

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A state legislature, or a municipality acting under state authority in the exercise of the police power, may regulate the manufacturing and selling of bread.[1] Matters which may be regulated include prescribing the quality of ingredients to be used in bread,[2] requiring the wrapping of loaves of bread in paper when they are exposed for sale,[3] and requiring labels to be placed upon each loaf of bread stating the size of the loaf and the name or trademark of the manufacturer.[4]

Pursuant to federal statute,[5] a food that bears the term "wheat" in the ingredient list or in a separate "Contains wheat" statement in its labeling, and also bears the claim "gluten-free" will be deemed misbranded unless the word "wheat" in the ingredient list or in the "Contains wheat" statement is followed by the statement "The wheat has been processed to allow this food to meet the Food and Drug Administration (FDA) requirements for gluten-free foods."

Footnotes

1 P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934); Schmidinger v. City of Chicago, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913); In re McNeal, 32 Cal. App. 2d 391, 89 P.2d 1096 (3d Dist. 1939); State v. Layton, 160 Mo. 474, 61 S.W. 171 (1901); State v. Normand, 76 N.H. 541, 85 A. 899 (1913). As to a municipality's police power, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 358.

2 State v. Layton, 160 Mo. 474, 61 S.W. 171 (1901).

3 State v. Normand, 76 N.H. 541, 85 A. 899 (1913).

4 In re McNeal, 32 Cal. App. 2d 391, 89 P.2d 1096 (3d Dist. 1939); City of Chicago v. Schmidinger, 243 Ill. 167, 90

N.E. 369 (1909), aff'd, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913).
As to the regulation of the weight of loaves, see § 30.

[5] 21 C.F.R. § 101.91, referencing 21 U.S.C.A. § 343(w)(1)(A).

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35A Am. Jur. 2d Food § 30

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II. Regulation

E. Particular Foods

1. In General

§ 30. Food regulations related to bread—Size and weight of loaves

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Statutes and ordinances prescribing standard sizes for loaves of bread and prohibiting, with minor exceptions, the sale of other sizes, when reasonable, are a legitimate exercise of the police power of the state or the municipal corporation acting under its delegated authority.[1] The primary purpose of such regulations is to prevent fraud on the public in the sale of bread,[2] but a secondary purpose is to prevent unfair competition among dealers.[3] Such regulations, when reasonable, are not invalid as taking property without just compensation or due process of law,[4] or as abridging or unlawfully interfering with the right to carry on a business;[5] nor are they invalid as an undue interference with the freedom of contract.[6]

The fixing of a maximum weight for each size or class of bread loaves is reasonable.[7] However, the weight of a loaf of bread when baked varies through the loss of moisture from the weight of the dough before baking and from the time it is baked until it is sold, thus, the tolerances between the minimum and maximum weights permitted must be reasonable.[8]

An ordinance which fixes the weight of loaves of bread which may be sold is not invalid because other food products are not so regulated or because it expressly exempts the sale of stale bread from it provisions.[9]

Footnotes

[1] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934); Schmidinger v. City of Chicago, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913); Allion v. City of Toledo, 99 Ohio St. 416, 124 N.E. 237, 6 A.L.R. 426 (1919).
The control of the baking-pan size for bread may be viewed as a corollary to the control of weights and as a reasonable device to give an additional assurance against customer deception. State v. Hudson House, Inc., 231 Or. 164, 371 P.2d 675 (1962).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

As to a municipality's police power, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 358.

[2] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A.L.R. 661 (1924); Schmidinger v. City of Chicago, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913).

[3] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934).

[4] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934); City of Chicago v. Schmidinger, 243 Ill. 167, 90 N.E. 369 (1909), aff'd, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913).

[5] People v. Wagner, 86 Mich. 594, 49 N.W. 609 (1891).

[6] Schmidinger v. City of Chicago, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913).

[7] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934).

[8] P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S. Ct. 277, 78 L. Ed. 505, 90 A.L.R. 1285 (1934).

[9] City of Chicago v. Schmidinger, 243 Ill. 167, 90 N.E. 369 (1909), aff'd, 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (1913).

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II. Regulation

E. Particular Foods

1. In General

§ 31. Food regulations related to meat

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A.L.R. Library

Validity and construction of statutes, ordinances, or regulations concerning the sale of horse meat for human consumption, 19 A.L.R.2d 1013

Validity, under Commerce Clause (Art I, sec. 8, cl 3), of state statutes regulating labeling of food, 79 A.L.R. Fed. 246

A statute or ordinance reasonably regulating the sale of meat by meat dealers or butchers is a valid exercise of the police power,[1] whether it prohibits the sale of meat except under specified conditions,[2] or imposes a license tax in order to defray the expense of inspecting the meats and markets.[3] Under a delegated power to make and enforce ordinances respecting infectious diseases and health, a municipal corporation may enact an ordinance requiring the inspection of all carcasses of meat animals offered for sale within the limits of the municipality.[4]

State or municipal regulations of the sale of meats must not interfere with interstate commerce,[5] by discriminating against the meat products of other states in favor of its own products,[6] or by requiring an inspection of such a character, and burdened with such conditions, that wholesome meats which are the product of animals slaughtered in other states are prevented from sale in the state altogether.[7]

That Congress has enacted legislation prohibiting the interstate transportation of meat or meat products unless inspected according to federal law does not deprive a state of the power to inspect meat slaughtered in other states for the protection of its citizens, and Congress will not be presumed to have intended to abrogate such a power of a state except in a plain case.[8]

A state may not prohibit the keeping, for shipment out of the state, of unwholesome meats, as this subject is exclusively within the control of Congress under the Commerce Clause of the Federal Constitution.[9]

Footnotes

1 Brimmer v. Rebman, 138 U.S. 78, 11 S. Ct. 213, 34 L. Ed. 862 (1891); State v. Double Seven Corp., 70 Ariz. 287, 219 P.2d 776, 19 A.L.R.2d 1007 (1950); Trigg v. Dixon, 96 Ark. 199, 131 S.W. 695 (1910); State v. Starkey, 112 Me. 8, 90 A. 431 (1914).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.
As to a municipality's police power, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 358.

2 State v. Double Seven Corp., 70 Ariz. 287, 219 P.2d 776, 19 A.L.R.2d 1007 (1950); Sterrett & Oberle Packing Co. v. City of Portland, 79 Or. 260, 154 P. 410 (1916); State v. Ehlenfeldt, 94 Wis. 2d 347, 288 N.W.2d 786 (1980).

3 State v. Double Seven Corp., 70 Ariz. 287, 219 P.2d 776, 19 A.L.R.2d 1007 (1950); Provo City v. Provo Meat & Packing Co., 49 Utah 528, 165 P. 477 (1917).

4 State v. Starkey, 112 Me. 8, 90 A. 431 (1914).

5 Armour & Co. v. City Council of Augusta, 134 Ga. 178, 67 S.E. 417 (1910).

6 Brimmer v. Rebman, 138 U.S. 78, 11 S. Ct. 213, 34 L. Ed. 862 (1891); State of Minnesota v. Barber, 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455 (1890); Armour & Co. v. City Council of Augusta, 134 Ga. 178, 67 S.E. 417 (1910) (municipal ordinance).

7 Brimmer v. Rebman, 138 U.S. 78, 11 S. Ct. 213, 34 L. Ed. 862 (1891); State of Minnesota v. Barber, 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455 (1890).

8 American Meat Institute v. Ball, 520 F. Supp. 929 (W.D. Mich. 1981); Armour & Co. v. City Council of Augusta, 134 Ga. 178, 67 S.E. 417 (1910).
As to the federal requirement of inspection of meat, see § 32.

9 State v. Peet, 80 Vt. 449, 68 A. 661 (1908).
As to the Commerce Clause, generally, see Am. Jur. 2d, Commerce §§ 1 to 10.

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35A Am. Jur. 2d Food § 32

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II. Regulation

E. Particular Foods

1. In General

§ 32. Food regulations related to meat—Federal legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A.L.R. Library

Validity, construction, and application of sec. 22 of Federal Meat Inspection Act (21 U.S.C.A. sec. 622) making it federal offense to bribe federal meat inspectors or for inspectors to accept bribe, 21 A.L.R. Fed. 977

Federal law regulates a broad range of activities related to meat processing under the Federal Meat Inspection Act (FMIA).[1] That is, the Federal Meat Inspection Act[2] requires the Department of Agriculture to insure that meat and meat food products distributed to consumers are wholesome, unadulterated, and properly marked, labeled, and packaged and that meat products are made available to consumers in a form and manner consistent with the public health and welfare.[3] The Federal Meat Inspection Act and the Poultry Inspection Act[4] are parallel in most respects, and identical in others, and are construed to have the same meaning, when possible, in view of their common purpose[5] to prohibit the movement or sale in interstate commerce of meat and poultry products which are adulterated or misbranded.[6]

The Federal Meat Inspection Act prohibits the sale or offer for sale in interstate[7] or foreign commerce[8] of meat or meat food products if their labeling is false or misleading in any particular.[9] The statutory provision that meat is misbranded "if its labeling is false or misleading in any particular" does not require that the false or misleading statements be "material."[10]

One of the principal objects of the Federal Meat Inspection Act is to safeguard the food products in question against alteration or substitution and to enable government officials to maximize the effectiveness of the inspection process.[11]

The regulations concerning the labeling of meat products not cured by using nitrates but sold under the names of products

usually cured by using them[12] are designed to protect the public by preventing the sale of meat products under traditional names when those products bear no resemblance to the items commonly sold under those names.[13]

Federal regulations,[14] prescribe the conditions under which states that administer cooperative state meat inspection programs and establishments that operate under such programs may participate in a cooperative interstate shipment program. The regulations address: requirements for establishments and ineligible establishments;[15] a state's request for a cooperative agreement;[16] establishment selection, and the official number for selected establishments;[17] the commencement of a cooperative interstate shipment program and the inspection by designated personnel and official marks;[18] federal oversight of a cooperative interstate shipment program;[19] and the necessity of quarterly reports.[20]

Footnotes

1 Thornton v. Tyson Foods, Inc., 2020 WL 5076083 (D.N.M. 2020).

2 21 U.S.C.A. §§ 601 to 695.

3 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998); National Pork Producers Council v. Bergland, 631 F.2d 1353 (8th Cir. 1980); Michigan Meat Ass'n v. Block, 514 F. Supp. 560 (W.D. Mich. 1981).
As to meat inspection, generally, see Federal Procedure, L. Ed. §§ 35:525 to 35:545.

4 21 U.S.C.A. §§ 451 to 472
As to the federal inspection of poultry products, see Federal Procedure, L. Ed. §§ 35:546 to 35:573.

5 Kenney v. Glickman, 96 F.3d 1118 (8th Cir. 1996); Original Honey Baked Ham Co. of Georgia, Inc. v. Glickman, 172 F.3d 885 (D.C. Cir. 1999).

6 21 U.S.C.A. § 452; 21 U.S.C.A. § 603.

7 Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998); Michigan Meat Ass'n v. Block, 514 F. Supp. 560 (W.D. Mich. 1981).

8 Ganadera Indus., S.A. v. Block, 556 F. Supp. 354 (D.D.C. 1982), judgment aff'd, 727 F.2d 1156 (D.C. Cir. 1984).

9 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).
The FMIA expressly preempted the application against federally inspected swine slaughterhouses of a California Penal Code provision prohibiting the sale of meat or a meat product of "nonambulatory" animals for human consumption and requiring immediate euthanization of nonambulatory animals. National Meat Ass'n v. Harris, 565 U.S. 452, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012).

10 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).
Food products derived from bison meat are not within the coverage of the Meat Inspection Act. U.S. v. Articles of Food. . . Buffalo Jerky, 456 F. Supp. 207 (D. Neb. 1978).

11 U.S. v. Lewis, 235 U.S. 282, 35 S. Ct. 44, 59 L. Ed. 229 (1914).

12 9 C.F.R. §§ 317.17, 319.2.

13 National Pork Producers Council v. Bergland, 631 F.2d 1353 (8th Cir. 1980).

14 9 C.F.R. §§ 332.1 to 332.14.

15 9 C.F.R. § 332.3.

16 9 C.F.R. § 332.4.

17 9 C.F.R. § 332.5.

[18] 9 C.F.R. § 332.6.

[19] 9 C.F.R. § 332.7.

[20] 9 C.F.R. § 332.8.

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II. Regulation

E. Particular Foods

1. In General

§ 33. Food regulations related to eggs

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 2

The regulation of the sale of eggs is within the police power of the state, and a reasonable regulation intended to protect the public health against unwholesome eggs, and that does not infringe upon the Commerce Clause of the Federal Constitution, is valid.[1]

To protect consumers from deceit, the state may require eggs to be graded according to established criteria and may prohibit the sale of eggs under any designation other than those established by the statute.[2] Federal egg control laws do not preempt state weight and measure laws concerning retail egg sales.[3]

Eggs which are decomposed or otherwise unfit for use as food have been held to be within the provisions of the federal law forbidding the interstate shipment of any article of food that is adulterated or misbranded.[4]

The Egg Products Inspection Act (EPIA) regulates the processing and distribution of eggs and egg products and, among other things, provides for the inspection of certain egg products, restrictions upon the disposition of certain qualities of eggs, and the uniformity of standards for eggs.[5] The EPIA permits noncontiguous areas of the United States to impose labeling requirements, but does not permit those requirements to be imposed in a manner that discriminatorily burdens interstate commerce.[6]

Footnotes

[1] Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670 (7th Cir. 1992); Ex parte Foley, 172 Cal. 744, 158 P. 1034 (1916).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.
As to the Commerce Clause, generally, see Am. Jur. 2d, Commerce §§ 1 to 10.

[2] J. W. Nichols Co. v. White, 325 S.W.2d 867 (Tex. Civ. App. Austin 1959).

[3] L & L Started Pullets, Inc. v. Gourdine, 592 F. Supp. 367, 79 A.L.R. Fed. 229 (S.D. N.Y. 1984), judgment aff'd, 762 F.2d 1 (2d Cir. 1985) (applying New York state law and city ordinances).

[4] U.S. v. Thirteen Crates of Frozen Eggs, 208 F. 950 (S.D. N.Y. 1913), aff'd, 215 F. 584 (C.C.A. 2d Cir. 1914).

[5] 21 U.S.C.A. § 1032.
As to federal egg inspection, generally, see Federal Procedure, L. Ed. §§ 35:574 to 35:583.

[6] United Egg Producers v. Department of Agriculture of Com. of Puerto Rico, 77 F.3d 567 (1st Cir. 1996).

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II. Regulation

E. Particular Foods

1. In General

§ 34. Food regulations related to confectionery and soft drinks

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 2

The Food, Drugs, and Cosmetics Act applies to soft drinks.[1] A state, a municipal corporation, or an administrative officer or board of health acting pursuant to a delegated power from the state, may also license and regulate the manufacture or preparation and sale of soft drinks,[2] as well as confectionery.[3] Soft drink license regulations may be implemented by a municipal licensing board to regulate establishments selling soft-drink beverages as an adjunct to a business which primarily provides an establishment where patrons gather to socialize and to enjoy some form of entertainment,[4] including adult entertainment.[5]

Legislation may regulate the use of artificial sweeteners such as saccharin,[6] cyclamates,[7] and aspartame.[8]

The federal court of appeals has exclusive jurisdiction of a petition seeking an order compelling the Food and Drug Administration to hold a hearing on the safety of the artificial food sweetener aspartame.[9] However, the Food and Drug Administration (FDA) did not have primary jurisdiction over consumers' actions against the manufacturer of soft drinks that contained an additive that was a known carcinogen, alleging claims under a state's Safe Drinking Water and Toxic Enforcement Act based on the manufacturer's alleged materially misleading public statements and failure to warn, where the consumers' allegations did not clearly fall within the labeling jurisdiction of the FDA, where, even if the FDA were to take action to regulate the labeling of the additive, federal law would not dispose of the consumers' state law claims.[10]

Footnotes

1 U.S. v. Forty Barrels and Twenty Kegs of Coca Cola, 241 U.S. 265, 36 S. Ct. 573, 60 L. Ed. 995 (1916).

2 City of Newport v. Wagner, 168 Ky. 641, 182 S.W. 834 (1916); Westinghouse Beverage Group, Inc. v. Department of

Taxation, 101 Nev. 184, 698 P.2d 866 (1985); State v. Dannenberg, 151 N.C. 718, 66 S.E. 301 (1909); Longbrake v. State, 112 Ohio St. 13, 2 Ohio L. Abs. 757, 3 Ohio L. Abs. 99, 146 N.E. 417, 41 A.L.R. 925 (1925); City of Portland v. Traynor, 94 Or. 418, 183 P. 933, 6 A.L.R. 1410 (1919).

[3] Crackerjack Co. v. City of Chicago, 330 Ill. 320, 161 N.E. 479, 58 A.L.R. 287 (1928); Commonwealth v. Pflaum, 236 Pa. 294, 84 A. 842 (1912).

[4] Com. v. Blackgammon's, Inc., 382 Mass. 610, 417 N.E.2d 377 (1981).

[5] Inner Visions, Ltd. v. City of Smyrna, 260 Ga. 902, 400 S.E.2d 915 (1991).

[6] Jackson v. H. R. Nicholson Co., 545 F. Supp. 762 (D.D.C. 1982); Heller v. Coca-Cola Co., 230 A.D.2d 768, 646 N.Y.S.2d 524 (2d Dep't 1996); Longbrake v. State, 112 Ohio St. 13, 2 Ohio L. Abs. 757, 3 Ohio L. Abs. 99, 146 N.E. 417, 41 A.L.R. 925 (1925).

[7] California Canners & Growers Ass'n v. U.S., 7 Cl. Ct. 69 (1984).

[8] Community Nutrition Institute v. Young, 773 F.2d 1356 (D.C. Cir. 1985).

[9] Community Nutrition Institute v. Young, 773 F.2d 1356 (D.C. Cir. 1985).

[10] Sciortino v. Pepsico, Inc., 108 F. Supp. 3d 780 (N.D. Cal. 2015) (applying, in part, California law).

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E. Particular Foods

1. In General

§ 35. Food regulations related to oleomargarine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 8

Oleomargarine is a manufactured product made of oleo oil, neutral lard, milk and cream, and pure butter, although pure butter is not used in all grades,[1] and, when properly made, is an article of commerce.[2]

Because it can be easily colored to resemble butter, however, the packaging and labeling of colored oleomargarine must comply with express statutory requirements.[3] The sale, or the serving in public eating places, of colored oleomargarine or colored margarine, without its clear identification as such, depresses the market in interstate commerce for butter and for oleomargarine that is properly labeled and unadulterated and thus constitutes a burden on interstate commerce.[4]

Provisions of a State Milk and Milk Products Act (MMPA) requiring the word "margarine" to be in type at least as large as any other type or lettering on a label in "a color in strong contrast to the color of the container," and requiring the label to include the name and address of the manufacturer or distributor, the net weight, and all ingredients, are preempted by the Federal Food Drug and Cosmetic Act (FDCA), since the MMPA's requirements are not identical to the FDCA's requirements.[5]

Footnotes

1 State v. Armour Packing Co., 124 Iowa 323, 100 N.W. 59 (1904).

2 Schollenberger v. Com. of Pa., 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49 (1898).

3 21 U.S.C.A. § 347(b).

4 21 U.S.C.A. § 347a.

[5] Simpson v. The Kroger Corp., 219 Cal. App. 4th 1352, 162 Cal. Rptr. 3d 652 (2d Dist. 2013), referencing 21 U.S.C.A. § 347(b)(3).

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II. Regulation

E. Particular Foods

1. In General

§ 36. Food regulations related to coffee

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Food 2

The state may exercise its police powers to protect the public against the sale of adulterated articles of food by prohibiting the sale of coffee imported from foreign countries, containing inferior beans so coated and colored as to conceal damaged portions or as to make it appear to the ordinary untrained observer to be of a better quality or greater value than it actually is.[1]

Footnotes

[1] Crossman v. Lurman, 192 U.S. 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

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E. Particular Foods

2. Dairy Products

a. In General

§ 37. Food regulations related to dairy products, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A.L.R. Library

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 A.L.R.2d 103

Given that the germs of many diseases are disseminated through impure milk,[1] and that dairy products, and their peculiar liability to contamination and adulteration, are universally used as food,[2] the milk industry is a proper subject for regulation under the state's police power.[3] In addition, the Commerce Clause extends to the federal regulation of milk and the concomitant prohibition of adulterated milk shipped in interstate commerce.[4]

The main purpose of milk control laws is to insure a sufficient supply of wholesome milk[5] and to protect an essential food supply.[6]

Legislation relating to the regulation and control of milk is valid so long as it is not unreasonable or discriminatory.[7] A milk control act which requires the registration and inspection of dairy farms producing milk to be sold in a state, including dairy farms in neighboring states, does not unconstitutionally discriminate against out-of-state dairy farmers either on its face or as applied when any applicant for a state permit is entitled to the immediate issuance of the permit upon showing the applicant has received a satisfactory grade A pasteurized milk ordinance rating.[8] In contrast, a milk control act that excludes out-of-state milk and assures local dairy farmers of the whole state market has an unconstitutional discriminatory effect if it is applied to exclude out-of-state milk.[9]

Footnotes

[1] City of St. Louis v. Schuler, 190 Mo. 524, 89 S.W. 621 (1905); McKenna v. City of Galveston, 113 S.W.2d 606 (Tex. Civ. App. Galveston 1938), dismissed; City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).

[2] U.S. v. Rock Royal Co-op., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); Pacific Coast Dairy v. Police Court of City and County of San Francisco, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217 (1932); Witt v. Klimm, 97 Cal. App. 131, 274 P. 1039 (1st Dist. 1929); Stracquadanio v. Department of Health of City of New York, 285 N.Y. 93, 32 N.E.2d 806 (1941); Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235 (1938).

[3] National Farmers Organization Irasburg v. Commissioner of Agriculture, State of Conn., 711 F.2d 1156 (2d Cir. 1983); Golden Cheese Co. v. Voss, 230 Cal. App. 3d 547, 281 Cal. Rptr. 587 (4th Dist. 1991); Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food and Rural Resources, 483 A.2d 1213 (Me. 1984); Tuscan Dairy Farms, Inc. v. Barber, 45 N.Y.2d 215, 408 N.Y.S.2d 348, 380 N.E.2d 179 (1978).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

[4] U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942); U. S. v. David Buttrick Co., 91 F.2d 66 (C.C.A. 1st Cir. 1937); U.S. v. Varela-Cruz, 66 F. Supp. 2d 274 (D.P.R. 1999).

[5] Penn Dairies v. Milk Control Commission, 344 Pa. 635, 26 A.2d 431 (1942), judgment aff'd, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943).

[6] Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126 (1966); Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235 (1938); Reynolds v. Milk Com'n of Virginia, 163 Va. 957, 179 S.E. 507 (1935).

[7] Witt v. Klimm, 97 Cal. App. 131, 274 P. 1039 (1st Dist. 1929); Read v. Graham, 31 Ky. L. Rptr. 569, 102 S.W. 860 (Ky. 1907).
Even accepting that the State of Florida had a substantial interest in combating deception and in establishing nutritional standards for milk sold in Florida, it failed to show that its prohibition of use of the term "skim milk" to describe the all-natural milk produced by the dairy, from which all of the cream had been skimmed, solely because the dairy refused to fortify the milk with the Vitamin A lost in the skimming process, was reasonable and not more extensive than necessary to serve this state interest; accordingly, the state's restriction on dairy's commercial speech violated its First Amendment rights. Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228 (11th Cir. 2017).

[8] National Farmers Organization Irasburg v. Commissioner of Agriculture, State of Conn., 711 F.2d 1156 (2d Cir. 1983) (applying Connecticut law).

[9] Safeway Stores, Inc. v. Board of Agriculture of State of Hawaii, 590 F. Supp. 778 (D. Haw. 1984) (applying Hawaii law).

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E. Particular Foods

2. Dairy Products

a. In General

§ 38. Food regulations related to standards of richness of dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A state or other municipality may prohibit the sale of milk below a certain standard of richness[1] to protect the public health[2] and prevent fraud.[3] The legislation may identify the standard of quality of milk or cream, prohibit the production, sale, or distribution of milk or cream that is substandard, divide the standard into classes, and regulate the manner of their use, so long as these standards, classes, and regulatory provisions are neither unreasonable nor oppressive.[4]

Footnotes

1 National Farmers Organization Irasburg v. Commissioner of Agriculture, State of Conn., 711 F.2d 1156 (2d Cir. 1983) (applying Connecticut law); Smith v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 23 F.3d 1134 (7th Cir. 1994) (applying Wisconsin law).

2 Anderson v. City of Tampa, 121 Fla. 670, 164 So. 546 (1935); City of St. Louis v. Grafeman Dairy Co., 190 Mo. 507, 89 S.W. 627 (1905).

3 State v. Crescent Creamery Co., 83 Minn. 284, 86 N.W. 107 (1901); City of St. Louis v. Grafeman Dairy Co., 190 Mo. 507, 89 S.W. 627 (1905).

4 Leaman v. District of Columbia, 55 F.2d 1020 (App. D.C. 1932); Shelton v. City of Shelton, 111 Conn. 433, 150 A. 811 (1930); State v. Crescent Creamery Co., 83 Minn. 284, 86 N.W. 107 (1901); State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 160 Or. 205, 84 P.2d 471 (1938); Finucane v. Pennsylvania Milk Marketing Bd., 150 Pa. Commw. 319, 615 A.2d 936 (1992).

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II. Regulation

E. Particular Foods

2. Dairy Products

a. In General

§ 39. Food regulations related to adulteration of dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2, 6

A.L.R. Library

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129

The federal interest in protecting consumers by regulating the sale of adulterated milk entering interstate commerce is a legitimate federal interest; thus, the federal government is authorized under the Commerce Clause to regulate such activity.[1] State legislatures, exercising their police power for the protection of the public health, may also forbid the sale of milk adulterated by the addition of water or any foreign substance.[2] Such legislation constitutionally may forbid the use of preservatives[3] or artificial coloring[4] in milk offered for sale, regardless of whether the preservative or coloring is deleterious to the health.[5]

Adulterated milk need not be dangerous or fraudulent to be embargoed or detained; that it is adulterated is sufficient.[6]

Footnotes

[1] U.S. v. Vidal-Cruz, 67 F. Supp. 2d 35 (D.P.R. 1999).
As to the Commerce Clause, generally, see Am. Jur. 2d, Commerce §§ 1 to 10.

[2] Dade v. U.S., 40 App. D.C. 94, 1913 WL 19989 (App. D.C. 1913); Pacific Coast Dairy v. Police Court of City and County of San Francisco, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217 (1932); State v. Schlenker, 112 Iowa 642, 84 N.W. 698 (1900); Clover Leaf Dairy v. State, 285 Mont. 380, 948 P.2d 1164 (1997).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.

[3] Isenhour v. State, 157 Ind. 517, 62 N.E. 40 (1901); City of St. Louis v. Schuler, 190 Mo. 524, 89 S.W. 621 (1905).

[4] City of St. Louis v. Jud, 236 Mo. 1, 139 S.W. 441 (1911).

[5] State v. Schlenker, 112 Iowa 642, 84 N.W. 698 (1900); City of St. Louis v. Schuler, 190 Mo. 524, 89 S.W. 621 (1905).

[6] Clover Leaf Dairy v. State, 285 Mont. 380, 948 P.2d 1164 (1997).

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II. Regulation

E. Particular Foods

2. Dairy Products

a. In General

§ 40. Food regulations related to pasteurization of dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2, 6

For the protection of the public health, the states' police power may be used to require that all milk for human consumption be pasteurized[1] and may prescribe the conditions under which the pasteurization is accomplished.[2] A municipality cannot, however, erect a tariff barrier by prohibiting the sale or distribution within the city limits of milk which was pasteurized outside the limits of the city[3] when the effect of such legislation imposes an undue burden on interstate commerce.[4]

A grocery product distributor's petition before a local board, to amend or repeal an administrative rule requiring milk sold in the state to be labeled with a "sell-by" date no longer than 12 days after its pasteurization and prohibiting the sale of milk after such date, was an administrative rulemaking proceeding subject to the arbitrary and capricious review by the Supreme Court rather than a contested case proceeding, even though the distributor petitioned the Board after it rescinded an individual exemption allowing the distributor to sell and market dual-date milk with "use-by" and "sell-by" dates, where the distributor sought a new rule that would have been generally applicable to all milk producers in the state.[5]

Courts take judicial notice that bacteria, harmful to human consumers, are found in raw milk, and that pasteurization destroys this deleterious germ life.[6]

Footnotes

[1] City of Phoenix v. Breuninger, 50 Ariz. 372, 72 P.2d 580 (1937); Schlenker v. Board of Health of Auglaize County General Health Dist., 171 Ohio St. 23, 12 Ohio Op. 2d 42, 167 N.E.2d 920 (1960); City of Weslaco v. Melton, 158 Tex. 61, 308 S.W.2d 18 (1957); Kenley v. Solem, 237 Va. 202, 375 S.E.2d 532 (1989).
As to conflict between state statutes and municipal ordinances, see § 9.

[2] Koy v. City of Chicago, 263 Ill. 122, 104 N.E. 1104 (1914); Pfeffer v. City of Milwaukee, 171 Wis. 514, 177 N.W. 850, 10 A.L.R. 128 (1920).

[3] La Franchi v. City of Santa Rosa, 8 Cal. 2d 331, 65 P.2d 1301, 110 A.L.R. 639 (1937); Gustafson v. City of Ocala, 53 So. 2d 658 (Fla. 1951) (requirement that milk be pasteurized within county); Tenny v. Sainsbury, 7 A.D.2d 514, 184 N.Y.S.2d 185 (4th Dep't 1959).

[4] Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951).

[5] Core-Mark Intern., Inc. v. Montana Bd. of Livestock, 2014 MT 197, 376 Mont. 25, 329 P.3d 1278 (2014).
Civil penalties could be imposed on a farmer for each act of, inter alia, selling milk without a milk distributor's license and selling unpasteurized milk that was not labeled as such. State v. Brown, 2014 ME 79, 95 A.3d 82 (Me. 2014).

[6] Schlenker v. Board of Health of Auglaize County General Health Dist., 171 Ohio St. 23, 12 Ohio Op. 2d 42, 167 N.E.2d 920 (1960).

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II. Regulation

E. Particular Foods

2. Dairy Products

a. In General

§ 41. Food regulations related to dairy product receptacles

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

The legislature may exercise its police power to require dealers or distributors of milk and other dairy products to provide sanitary cans, bottles, and other receptacles,[1] and may designate the types of containers to be used.[2]

A state statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sales in other nonreturnable, nonrefillable containers such as paperboard cartons, bears a rational relation to the stated objectives of promoting resource conservation, easing solid waste disposal problems and conserving energy and, hence, passes muster under the equal protection rationality test and does not violate the Equal Protection Clause of the Fourteenth Amendment.[3] Likewise, it does not violate the Commerce Clause of the Federal Constitution when it regulates even-handedly by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the state, the burden imposed on interstate commerce is relatively minor, and no approach with a lesser impact on interstate activities is available.[4]

Milk dealers may be required to put milk for delivery in sealed containers[5] and may be subject to reasonable requirements as to the washing of the receptacles used in the transportation and delivery of milk.[6] Such acts are constitutional when they operate uniformly on all those engaged in the dairy industry.[7]

Regulations requiring containers to have their capacity stamped on them and making it a misdemeanor to have in one's possession, with intent to use, containers of less capacity than they are marked are valid even though they do not apply to the sale of other commodities by liquid measure.[8]

Footnotes

1 Pacific Coast Dairy v. Police Court of City and County of San Francisco, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217 (1932); Board of Health of Covington v. Kollman, 156 Ky. 351, 160 S.W. 1052 (1913).

2 Dean Milk Co. v. City of Chicago, 385 Ill. 565, 53 N.E.2d 612 (1944).

3 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).
As to the rational basis test, see Am. Jur. 2d, Constitutional Law §§ 850 to 852.

4 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).

5 State v. Stokes, 91 Conn. 67, 98 A. 294 (1916); Mannix v. Frost, 100 Misc. 36, 164 N.Y.S. 1050 (Sup 1917), aff'd, 181 A.D. 961, 168 N.Y.S. 1118 (3d Dep't 1917); City of Milwaukee v. Childs Co., 195 Wis. 148, 217 N.W. 703 (1928).

6 People v. Frudenberg, 209 N.Y. 218, 103 N.E. 166 (1913).

7 Pacific Coast Dairy v. Police Court of City and County of San Francisco, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217 (1932).

8 City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 N.E. 913 (1908).

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II. Regulation

E. Particular Foods

2. Dairy Products

b. Inspection and Licensing

§ 42. Food regulations related to inspection and licensing of daily products, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3

A.L.R. Library

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 A.L.R.2d 103

A state or a municipal corporation, if granted the power by the state, may legitimately exercise its police powers[1] to enact reasonable, nondiscriminatory regulations regarding the production and sale of milk. These statutes or regulations may require milk producers[2] and dealers[3] to submit their cows,[4] dairies,[5] and plants[6] to inspection by public officers, to register their herds with designated public authorities,[7] or to secure permits or licenses before selling milk to the public.[8] For example, a farmer was a "milk distributor" as defined by statute and was subject to licensing requirements for milk distributors, even though the farmer argued that he operated a dairy farm and that a "milk distributor" and "milk producer" were mutually exclusive, where the farmer sold milk products in their final form directly to consumers.[9] The fact that such legislation is inapplicable to dealers in other articles of food does not render them discriminatory.[10]

As a general rule, municipal regulations are invalid as being extraterritorial in effect if they apply to nonresidents in relation to the care of their herds and dairies outside the city limits, when the regulations only affect those who bring or send their milk into the city for sale,[11] although there is authority to the contrary.[12]

A municipal corporation having authority to provide for the inspection of milk may require milk vendors to register in the office of a health commissioner;[13] however, an arbitrary power to grant or withhold licenses to milk dealers cannot be

conferred upon a municipal board of health.[14]

Footnotes

1 People of State of New York v. Van De Carr, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305 (1905); City of St. Louis v. Liessing, 190 Mo. 464, 89 S.W. 611 (1905); People ex rel. Lodes v. Department of Health of City of New York, 189 N.Y. 187, 82 N.E. 187 (1907); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).
As to the police power, generally, see Am. Jur. 2d, Constitutional Law § 334.
As to the police power of municipalities, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 358.

2 New York State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n, 26 F. Supp. 2d 249 (D. Mass. 1998), aff'd, 198 F.3d 1 (1st Cir. 1999); City of Newport v. Hiland Dairy Co., 291 Ky. 561, 164 S.W.2d 818 (1942); Queens Farms, Inc. v. Gerace, 60 N.Y.2d 65, 467 N.Y.S.2d 561, 454 N.E.2d 1304 (1983); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918); Pennsylvania Ass'n of Milk Dealers v. Pennsylvania Milk Marketing Bd., 685 A.2d 643 (Pa. Commw. Ct. 1996).

3 Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939); Pennsylvania Ass'n of Milk Dealers v. Pennsylvania Milk Marketing Bd., 685 A.2d 643 (Pa. Commw. Ct. 1996).

4 Sanders v. Commonwealth, 117 Ky. 1, 25 Ky. L. Rptr. 1165, 77 S.W. 358 (1903); Korth v. City of Portland, 123 Or. 180, 261 P. 895, 58 A.L.R. 665 (1927).

5 Lundeen v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 189 Wis. 2d 255, 525 N.W.2d 758 (Ct. App. 1994) (the purpose of dairy farm inspection procedures is to enforce dairy farm standards).

6 Western New York Milk Producers Co-op Bargaining Agency v. Butcher, 154 A.D.2d 49, 551 N.Y.S.2d 626 (3d Dep't 1990).

7 City of Newport v. Hiland Dairy Co., 291 Ky. 561, 164 S.W.2d 818 (1942); Hill v. Fetherolf, 236 Pa. 70, 84 A. 677 (1912).

8 National Farmers Organization Irasburg v. Commissioner of Agriculture, State of Conn., 711 F.2d 1156 (2d Cir. 1983) (applying Connecticut law); Smith v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 23 F.3d 1134 (7th Cir. 1994) (applying Wisconsin law); Miller v. City of Birmingham, 151 Ala. 469, 44 So. 388 (1907); City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S.W. 617 (1905); Queens Farms, Inc. v. Gerace, 60 N.Y.2d 65, 467 N.Y.S.2d 561, 454 N.E.2d 1304 (1983); Meadowsweet Dairy, LLC v. Hooker, 71 A.D.3d 1266, 898 N.Y.S.2d 276 (3d Dep't 2010); Korth v. City of Portland, 123 Or. 180, 261 P. 895, 58 A.L.R. 665 (1927); Com., Milk Marketing Bd. v. Kreider Dairy Farms, Inc., 495 Pa. 268, 433 A.2d 472 (1981).
As to the validity of regulations designed to ensure that those engaged in agriculture are paid for their products, generally, see Am. Jur. 2d, Agriculture § 50.

9 State v. Brown, 2014 ME 79, 95 A.3d 82 (Me. 2014).

10 People of State of New York v. Van De Carr, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305 (1905); Miller v. City of Birmingham, 151 Ala. 469, 44 So. 388 (1907).

11 Korth v. City of Portland, 123 Or. 180, 261 P. 895, 58 A.L.R. 665 (1927); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).

12 Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827, 14 A.L.R.2d 98 (1949).

13 City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S.W. 617 (1905).

14 Bear v. City of Cedar Rapids, 147 Iowa 341, 126 N.W. 324 (1910); Whitney v. Watson, 85 N.H. 238, 157 A. 78 (1931); Urban v. Taylor, 14 N.J. Misc. 887, 188 A. 232 (Sup. Ct. 1936); Pennsylvania Ass'n of Milk Dealers v.

Pennsylvania Milk Marketing Bd., 685 A.2d 643 (Pa. Commw. Ct. 1996); Beatrice Foods Co. v. State Milk Commission, 205 Va. 763, 139 S.E.2d 922 (1965).

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II. Regulation

E. Particular Foods

2. Dairy Products

b. Inspection and Licensing

§ 43. Food regulations related to revocation of dairy product licenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3

A license to sell milk may be revoked upon proper cause, even though there is no statute or ordinance specifically authorizing the revocation.[1] The violation of milk regulations[2] or the failure to maintain proper equipment and sanitary conditions[3] justifies the refusal of a milk dealer's license or permit to an applicant or the revocation of a license or permit previously granted. No constitutional rights are violated by revoking a milk license without a notice or hearing when the public health and welfare requires speedy and, in some cases, instant administrative action to prevent the distribution of impure or polluted milk.[4] When there is no provision for a hearing or for an appeal from a revocation order, mandamus will lie to redress any wrong suffered through an arbitrary or unreasonable revocation or an action based on false information.[5]

When a milk control act provides for a hearing before a license can be revoked, the hearing must be fair, with due notice given the licensee, and with an opportunity for the licensee to be heard, and a violation of a statute must be proved against the licensee.[6]

The power of a milk control board to revoke a license for the violation of price-fixing orders does not empower the board to render a judgment against a licensee in favor of a milk producer for damages for alleged underpayment by the licensee.[7] There is, however, authority to the contrary, holding that a board may order restitution as a condition on which the distributor may keep the license.[8]

The scope of review in a proceeding to revoke a milk dealer's license is whether the administrative determination is supported by a preponderance of the evidence.[9]

Footnotes

1 People ex rel. Lodes v. Department of Health of City of New York, 189 N.Y. 187, 82 N.E. 187 (1907).

2 Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 527 A.2d 913 (App. Div. 1987).

3 State v. Smith, 62 Fla. 93, 57 So. 426 (1912); People ex rel. Agins & Klugerman v. Board of Health of Department of Health of City of New York, 197 A.D. 562, 189 N.Y.S. 507 (1st Dep't 1921).

4 People ex rel. Lodes v. Department of Health of City of New York, 189 N.Y. 187, 82 N.E. 187 (1907).
As to revocation of licenses, generally, see Am. Jur. 2d, Licenses and Permits §§ 56 to 63.

5 People ex rel. Lodes v. Department of Health of City of New York, 189 N.Y. 187, 82 N.E. 187 (1907); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918).
As to mandamus, generally, see Am. Jur. 2d, Mandamus §§ 1 to 6.

6 Grandview Dairy v. Baldwin, 239 A.D. 640, 269 N.Y.S. 116 (3d Dep't 1934).

7 Devlin v. Milk Control Commission, 352 Pa. 204, 42 A.2d 596 (1945).

8 White Way Pure Milk Co. v. Alabama State Milk Control Bd., 265 Ala. 660, 93 So. 2d 509 (1957).

9 Lucille Farm Products, Inc. v. Barber, 112 A.D.2d 656, 492 N.Y.S.2d 168 (3d Dep't 1985); Guers Dairy, Inc. v. Com. Milk Marketing Bd., 90 Pa. Commw. 268, 494 A.2d 888 (1985).

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II. Regulation

E. Particular Foods

2. Dairy Products

c. Prices Paid

§ 44. Food regulations related to prices paid by processors of dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 4.5(1) to 4.5(4)

Forms

Am. Jur. Legal Forms 2d § 120:19 (Determination of price—Milk)

The federal milk market and regulatory scheme[1] benefits milk producers, prevents destructive competition, and maintains orderly marketing conditions[2] by regulating the prices processors must pay to dairy farmers for their raw milk.[3] The Agricultural Adjustment Act[4] does not set a minimum price for the resale of finished milk to consumers or wholesalers by processors.[5] Producers are free to bargain with handlers for prices higher than the federal order minimum.[6]

Absolute equality of treatment among handlers and producers is not required in milk marketing orders.[7] Under a state milk marketing act, a milk processor that used only milk produced by its own dairy herd was considered a "handler" and was obligated to participate in the milk pricing pool and pay fees for the administration of the pool.[8]

Footnotes

1 7 U.S.C.A. §§ 601 to 627.

2 Crane v. Commissioner of Dept. of Agriculture, Food and Rural Resources, 602 F. Supp. 280 (D. Me. 1985).

As to the validity of regulations designed to ensure that those engaged in agriculture are paid for their products, generally, see Am. Jur. 2d, Agriculture § 50.

[3] School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245, 98 Ed. Law Rep. 202 (E.D. Pa. 1995).

[4] 7 U.S.C.A. § 608c(5)(A).

[5] School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245, 98 Ed. Law Rep. 202 (E.D. Pa. 1995).

[6] Crane v. Commissioner of Dept. of Agriculture, Food and Rural Resources, 602 F. Supp. 280 (D. Me. 1985).

[7] Defiance Milk Products Co., A Div. of Diehl, Inc. v. Lyng, 857 F.2d 1065 (6th Cir. 1988).
A municipal ordinance that "producers" or "processors" of local food in the municipality were exempt from licensure and inspection would be construed by the Supreme Judicial Court to exempt such producers or processors only from municipal licensing and inspection requirements, as opposed to state licensing and inspection requirements, so as to avoid an issue of preemption, given that the legislature had already occupied the field with respect to licensing of milk "distributors" and food establishments. State v. Brown, 2014 ME 79, 95 A.3d 82 (Me. 2014).

[8] Kawamura v. Organic Pastures Dairy Co. LLC, 160 Cal. App. 4th 1374, 73 Cal. Rptr. 3d 500 (5th Dist. 2008).

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E. Particular Foods

2. Dairy Products

c. Prices Paid

§ 45. Food regulations related to prices paid by consumers of dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 4.5(1) to 4.5(4)

Forms

Am. Jur. Legal Forms 2d § 120:19 (Determination of price—Milk)

The Federal Secretary of Agriculture is authorized by Congress to fix the minimum prices of milk moving in interstate commerce.[1] A state may also statutorily establish a milk commission with the powers to create within the state natural market areas and fix the minimum and maximum prices to be charged for milk and cream in those areas.[2]

The delegation to a milk control board of the power to fix prices is valid so long as the legislature sets the standard, leaving to the board its proper administrative function.[3]

State price regulations affecting the purchase of milk by a distributor from the producers, which activity is essentially local and is wholly unrelated to and only remotely affects interstate commerce, are valid, even though the milk eventually enters interstate commerce.[4] Some states require their milk marketing boards to give equal consideration to the interests of milk producers, milk dealers, and the consuming public when fixing the price of milk.[5] Such consideration ensures that the producers of milk will be able to provide an ample supply of good and wholesome milk by eliminating price wars between dealers or the price gouging of consumers.[6]

Other state statutes regulating milk production and pricing primarily protect the consumer, not the milk producers, by protecting the quality and quantity of milk consumers drink.[7] Milk may be divided into various grades, and different prices

may be established for each grade,[8] and the handlers of milk and milk products may be divided into various classes and different prices established, depending on the class into which they fall, for the products they buy and sell.[9] A difference in the price fixed for the sale of milk by a grocer and the price fixed for sales by distributors delivering milk to consumers is based on a valid distinction between the two types of merchants, and does not deny a grocer the equal protection of the laws.[10] Similarly, an exemption, in a milk control act, of charitable organizations or their agents from the price-fixing provisions of the statute is valid.[11]

A state milk pricing order that subjects all fluid milk sold in the state by dealers to state retailers to an assessment, which is later distributed to dairy farmers in the state, violates the Commerce Clause because out-of-state milk is subject to the assessment on its sale to retailers, but the assessment is not distributed to the out-of-state producers.[12]

Footnotes

1 H.P. Hood & Sons v. U.S., 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478 (1939); Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1994 FED App. 0366P (6th Cir. 1994).
As to the power of Congress to regulate intrastate commerce affecting or imposing a burden on interstate commerce, see Am. Jur. 2d, Commerce § 27.

2 Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); Golden Cheese Co. v. Voss, 230 Cal. App. 3d 547, 281 Cal. Rptr. 587 (4th Dist. 1991); Appeal of Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 683 A.2d 972 (Pa. Commw. Ct. 1996).
The Milk Industry Regulatory Administration for the Commonwealth of Puerto Rico and executives were required under an agreement between the experts as to the parameters to establish factors to determine the return on equity (ROE), and other matters relating to the equity formula, and the establishment of the price of milk, to include an unsystematic risk in the proposed regulation for the milk industry in Puerto Rico, pursuant to the interpretation of milk processors challenging the constitutionality of the regulation, where the parties reached an agreement regarding risk premium. Vaqueria Tres Monjitas, Inc. v. Comas, 980 F. Supp. 2d 65 (D.P.R. 2013).

3 Ray v. Parker, 15 Cal. 2d 275, 101 P.2d 665 (1940); Schwegmann Bros. Giant Super Markets v. McCrory, 237 La. 768, 112 So. 2d 606 (1959); State ex rel. North Carolina Milk Commission v. Galloway, 249 N.C. 658, 107 S.E.2d 631 (1959); Savage v. Martin, 161 Or. 660, 91 P.2d 273 (1939); Babac v. Pennsylvania Milk Marketing Bd., 151 Pa. Commw. 579, 618 A.2d 1050 (1992).
As to the delegation of authority to administrative bodies, see § 6.

4 Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939).

5 School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 683 A.2d 972 (Pa. Commw. Ct. 1996) (in setting minimum prices for the sale of milk, the board may use a sample cross-section including both high-cost and low-cost dealers).

6 Guers Dairy, Inc. v. Com. Milk Marketing Bd., 90 Pa. Commw. 268, 494 A.2d 888 (1985).

7 Golden Cheese Co. v. Voss, 230 Cal. App. 3d 547, 281 Cal. Rptr. 587 (4th Dist. 1991).

8 New York State Guernsey Breeders' Co-op. v. Wickard, 141 F.2d 805, 153 A.L.R. 1165 (C.C.A. 2d Cir. 1944); Smith v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 23 F.3d 1134 (7th Cir. 1994) (applying Wisconsin law); State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 160 Or. 205, 84 P.2d 471 (1938); Finucane v. Pennsylvania Milk Marketing Bd., 150 Pa. Commw. 319, 615 A.2d 936 (1992).

9 U.S. v. Rock Royal Co-op., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); National Dairy Products Corp. v. Hoffman, 40 N.J. 475, 193 A.2d 125 (1963).

10 Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

11 People, on Complaint of McDonough, v. Bratowsky, 154 Misc. 432, 276 N.Y.S. 418 (Magis. Ct. 1934); State v.

Auclair, 110 Vt. 147, 4 A.2d 107 (1939).

[12] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994).

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E. Particular Foods

2. Dairy Products

d. Particular Products

§ 46. Food regulations related to ice cream and other frozen milk products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

A state or municipality may regulate within reasonable limits the manufacture and sale of ice cream or other frozen milk products to prevent the spread of disease or public deception and to secure a wholesome product.[1] Ice cream vendors may be required to secure a permit from the board of health.[2] The sale of ice cream manufactured by any method other than one in which the ingredients flow from a pasteurizing apparatus directly into the freezing apparatus and from there directly into a sterile container may be prohibited, even though other methods of manufacture may have been unattended by any harmful consequences.[3]

A regulation prescribing a butterfat standard for ice cream, intended to prevent the fraudulent deception of the public in the sale of a food product is valid and enforceable, even though it prohibits the sale as ice cream of compounds ordinarily sold as ice cream which are wholesome.[4] Statutes or ordinances which in effect exclude from the market altogether any frozen product under any name, however wholesome, that does not measure up to the standard of butterfat prescribed for ice cream are invalid as in excess of the police power and as depriving the manufacturer and vendor of liberty and property without due process of law.[5] However, there is other authority that such regulations are valid as reasonably necessary to protect the public from fraud and deception, when the product, although manufactured and sold under its own distinctive name and clearly and honestly labeled, bears such a resemblance to ice cream or other recognized milk products that the consumer cannot distinguish between them.[6]

A consumer's claim that food manufacturers violated state law by misrepresenting the number of calories in their line of diet ice cream bars was preempted by the Food, Drug, and Cosmetic Act (FDCA), where the consumer failed to plead that she tested the bars using each method permitted by the FDCA, and that each test result exceeded the calorie value on the bar's label by more than 20%.[7]

Footnotes

1 Hutchinson Ice Cream Co. v. State of Iowa, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916); Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937); Rigbers v. City of Atlanta, 7 Ga. App. 411, 66 S.E. 991 (1910); Dairy Queen of Wis. v. McDowell, 260 Wis. 471, 51 N.W.2d 34 (1952).

2 Wright v. Richmond County Dept. of Health, 182 Ga. 651, 186 S.E. 815 (1936).

3 Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204, 174 So. 609, 111 A.L.R. 103 (1937).

4 Hutchinson Ice Cream Co. v. State of Iowa, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916).

5 State v. A. J. Bayless Markets, Inc., 86 Ariz. 193, 342 P.2d 1088 (1959); City of New Orleans v. Toca, 141 La. 551, 75 So. 238 (1917); Com. ex rel. Woodside v. Sun Ray Drug Co., 383 Pa. 1, 116 A.2d 833 (1955).

6 Dairy Belle, Inc. v. Freeland, 175 Kan. 344, 264 P.2d 894 (1953).

7 Burke v. Weight Watchers Intern., Inc., 983 F. Supp. 2d 478 (D.N.J. 2013).

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II. Regulation

E. Particular Foods

2. Dairy Products

d. Particular Products

§ 47. Food regulations related to butter

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

Regulation of the weight of packages of butter, establishing standard sizes and requiring the label to state the actual weight of any package that varies from the standard, is a valid exercise of the police power to prevent fraud and deceit from being practiced on the purchaser,[1] and packages of butter which are under the weight stated on the paper in which they are wrapped are misbranded within the provisions of the federal legislation penalizing interstate commerce in misbranded articles of food.[2]

The section of the Federal Food, Drug, and Cosmetic Act,[3] which requires a product label to include the ingredients contained in the product prohibits the use of the word "butter" on the label of a product which fails to meet the statutory definition of butter, even if butter is an ingredient in the product.[4] Thus, a state statute which prohibits using the word "butter" on the label of a product which does not meet the state statutory definition of butter obstructs the purposes of the federal food labeling laws of avoiding the misbranding of food and informing the consumer of the actual characteristics and properties of food products, and therefore violates the Supremacy Clause.[5] However, labels for products containing butter in addition to canola or olive oil were not misleading under the Food Drug and Cosmetic Act (FDCA) regulation governing the labeling of nonstandardized products in describing the products as "butter" and "spreadable butter," since no reasonable consumer would have been misled by the labels, where the labels clearly stated that the product contained both butter and the additional oils.[6]

Footnotes

1 State v. Belle Springs Creamery Co., 83 Kan. 389, 111 P. 474 (1910).

2 U.S. v. Great Atlantic & Pacific Tea Co., 92 F.2d 610, 113 A.L.R. 961 (C.C.A. 2d Cir. 1937).

[3] 21 U.S.C.A. § 343(i).

[4] Lever Bros. Co. v. Maurer, 712 F. Supp. 645 (S.D. Ohio 1989).

[5] Lever Bros. Co. v. Maurer, 712 F. Supp. 645 (S.D. Ohio 1989).

[6] Simpson v. The Kroger Corp., 219 Cal. App. 4th 1352, 162 Cal. Rptr. 3d 652 (2d Dist. 2013).

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II. Regulation

E. Particular Foods

2. Dairy Products

d. Particular Products

§ 48. Food regulations related to filled dairy products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 2

"Filled dairy products" are defined as any milk or any food product made or manufactured therefrom to which has been added fat or oil other than milk fat so that the resulting product is in imitation or semblance of any dairy product.[1] Several states have enacted laws prohibiting or regulating the manufacture and sale of filled milk or its derivatives, on the grounds that filled milk used as a substitute for whole milk may have injurious effects on the public health, particularly if filled milk is used as food for infants.[2] A filled dairy product may be prohibited if, under all the circumstances in which it is sold and used, including its physical resemblance or lack of physical resemblance to milk, it is reasonably probable that the challenged food will be confused with milk by purchasers and consumers.[3] However, a total statutory prohibition of the manufacture and sale of filled dairy products is in excess of the police power and violates due process when the product involved is nutritious, wholesome, and healthful, is clearly and distinctly labeled, with its ingredients fully and correctly disclosed, and is marketed in a manner free from misrepresentation.[4]

The Federal Filled Milk Act,[5] which prohibits any milk, cream, or skimmed milk, to which has been added, or which has been blended or compounded with any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk[6] from being shipped or delivered in interstate or foreign commerce,[7] prevents the perpetration of frauds on consumers[8] and avoids harm to the public health through the substitution of inferior fats for butter fat in food products.[9] The Act is a permissible regulation of interstate commerce and does not infringe the Fifth Amendment.[10]

Footnotes

[1] General Foods Corp. v. Priddle, 569 F. Supp. 1378 (D. Kan. 1983) (applying Kansas law) (frozen whipped toppings with dairy ingredients are an "imitation or semblance of a dairy product," if they are similar to whipped cream in

color, taste, and consistency and are intended to be used for the same purposes as whipped cream).

2 Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235 (1938).

3 Dean Foods Co. v. Wisconsin Dept. of Agriculture, 504 F. Supp. 520 (W.D. Wis. 1980) (applying Wisconsin law).

4 People ex rel. Orcutt v. Instantwhip Denver, Inc., 176 Colo. 396, 490 P.2d 940 (1971).

5 21 U.S.C.A. §§ 61 to 64.

6 21 U.S.C.A. § 61.

7 21 U.S.C.A. § 62.

8 Carolene Products Co. v. U.S., 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. 15, 155 A.L.R. 1371 (1944); Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); Reesman v. State, 74 Wash. 2d 646, 445 P.2d 1004 (1968).

9 Carolene Products Co. of Litchfield, Ill., v. Wallace, 27 F. Supp. 110 (D. D.C. 1939), order aff'd, 307 U.S. 612, 59 S. Ct. 1033, 83 L. Ed. 1495 (1939); Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235 (1938).

10 Carolene Products Co. v. U.S., 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. 15, 155 A.L.R. 1371 (1944); U.S. v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

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III. Enforcement of Regulations

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Food 3, 12 to 16

A.L.R. Library

A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
West's A.L.R. Digest, Food 3, 12 to 16

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III. Enforcement of Regulations

A. In General

1. Overview

§ 49. Enforcement of food regulations, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 12 to 16

It is entirely in harmony with the general purpose of food and agricultural acts to provide both criminal and civil liability for violations of their provisions.[1] Such liability is for the purpose of administering a warning not to continue the acts complained of; that purpose generally is accomplished when there is recovery for one violation or default, which recovery acts as a deterrent to continuing disregard of the statute.[2]

Footnotes

1 People v. Beakes Dairy Co., 222 N.Y. 416, 119 N.E. 115, 3 A.L.R. 1260 (1918); Rubenstein & Son Produce v. State, 272 S.W.2d 613 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.
As to civil and criminal penalties for violations of food regulations, see § 55.

2 People v. Spencer, 201 N.Y. 105, 94 N.E. 614 (1911); Rubenstein & Son Produce v. State, 272 S.W.2d 613 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.

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III. Enforcement of Regulations

A. In General

1. Overview

§ 50. Statutory authority for enforcement of food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3, 12 to 16

A.L.R. Library

Validity of inspection conducted under provisions of Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. sec. 374(a)) authorizing FDA inspectors to enter and inspect food, drug, or cosmetic factory, warehouse, or other establishment, 18 A.L.R. Fed. 734

Forms

Am. Jur. Pleading and Practice Forms, Food § 20 (Motion in federal court—By owner of seized article-For permission to obtain samples of seized articles for analysis)

The Food, Drug, and Cosmetic Act authorizes examinations and inspections for the purpose of carrying out the provisions of the Act.[1]

Duly designated officers or employees of the Food and Drug Administration may, upon presenting a written notice and appropriate credentials, enter for inspection at reasonable times and in a reasonable manner (1) any factory, warehouse, or establishment in which food is manufactured, processed, packed, or held for introduction into interstate commerce or after such introduction, or (2) any vehicle being used to transport or hold such material in interstate commerce.[2]

The notice of inspection need not be advance notice,[3] nor does the notice need to contain the reasons for the inspection or what the inspector expects to find.[4] A separate notice of inspection is not required for each day of a multiple-day inspection.[5]

Neither the Food, Drug, and Cosmetic Act nor the regulations specifically authorize the use of photographs by Food and Drug Administration (FDA) inspectors; however, when such photographs are consented to, they may be introduced into evidence at a later judicial proceeding.[6]

Neither *Miranda* warnings nor search warrants are necessary for inspections, since the statute takes the place of a valid search warrant so long as the inspection is conducted reasonably as regards time, place, and method.[7] Thus, it has been held that warrantless inspections pursuant to the Food, Drug, and Cosmetic Act[8] are fully consistent with the Fourth Amendment.[9]

Even after a decision has been made to prosecute a company for food violations, the government does not act in bad faith by continuing to conduct warrantless regulatory inspections.[10]

A refusal to permit an inspection authorized by the statute is itself prohibited by the Act,[11] and the person refusing to permit an inspection is subject to the penalties set forth in the Act.[12] The right to inspect under the foregoing statute includes the right to obtain samples.[13]

The mere existence of a pending recommendation for criminal prosecution does not mean that evidence obtained by the FDA during inspections conducted subsequent to the recommendation was improperly obtained.[14]

There is some authority that an inspection pursuant to a notice under the Act to inspect is authorized only when there is a valid consent, and that if consent is withheld, a separate violation of the Act occurs, and the FDA inspectors are then required to obtain a warrant before the inspection can proceed.[15]

If an inspection is designed to allow for the seizure of identified goods, the proprietor's cooperation with the inspection is no consent to a seizure without a warrant.[16]

If the Secretary of Health and Human Services has credible evidence or information indicating that a shipment of imported food or portion thereof presents a threat of serious adverse health consequences or death to humans or animals, the Secretary must provide notice regarding such threat to the states in which the food is held or will be held, and to the states in which the manufacturer, packer, or distributor of the food is located, to the extent that the Secretary has knowledge of which states are so involved. In providing notice to a state, the Secretary shall request the state to take such action as the state considers appropriate, if any, to protect the public health regarding the food involved.[17] The Secretary may make grants to the states for the purpose of assisting the states with the costs of taking appropriate action to protect the public health in response to such notification.[18]

Footnotes

1 21 U.S.C.A. § 372(a).
The Secretary of Health and Human Services is authorized to make grants to states, territories, and Indian tribes for purposes of conducting such examinations and inspections. 21 U.S.C.A. § 399(a).

2 21 U.S.C.A. § 374(a)(1).
As to inspections for food regulation violations, see § 12.

3 U.S. v. Thriftimart, Inc., 429 F.2d 1006, 18 A.L.R. Fed. 726 (9th Cir. 1970).

4 Daley v. Weinberger, 400 F. Supp. 1288 (E.D. N.Y. 1975), judgment aff'd, 536 F.2d 519 (2d Cir. 1976).

5 U.S. v. Durbin, 373 F. Supp. 1136 (E.D. Okla. 1974).

[6] U.S. v. Acri Wholesale Grocery Co., 409 F. Supp. 529 (S.D. Iowa 1976).

[7] U.S. v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972); U.S. v. New England Grocers Supply Co., 488 F. Supp. 230 (D. Mass. 1980); U.S. v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973).

[8] 21 U.S.C.A. § 374.

[9] U.S. v. New England Grocers Supply Co., 488 F. Supp. 230 (D. Mass. 1980).

[10] U.S. v. Gel Spice Co., Inc., 773 F.2d 427 (2d Cir. 1985).

[11] 21 U.S.C.A. § 331(f).
That the defendant managers of a food warehouse had knowledge of the statute making it a crime to refuse entry to inspectors for the Food and Drug Administration did not vitiate the voluntariness of the managers' consent to the inspection conducted by FDA inspectors, when the managers were asked for permission to search and voiced no objection and there was no indication that the permission to inspect was granted solely out of fear of a criminal sanction. U.S. v. Thriftimart, Inc., 429 F.2d 1006, 18 A.L.R. Fed. 726 (9th Cir. 1970).

[12] U.S. v. New England Grocers Supply Co., 488 F. Supp. 230 (D. Mass. 1980).

[13] U.S. v. Roux Laboratories, Inc., 456 F. Supp. 973 (M.D. Fla. 1978).
As to obtaining samples, see § 51.

[14] U.S. v. Gel Spice Co., Inc., 773 F.2d 427 (2d Cir. 1985).

[15] U.S. v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532 (8th Cir. 1981).

[16] U.S. v. Articles of Drug Consisting of Following: An Undetermined Quantity of 100-Capsule Bottles, Labeled in Part: Imported from New Zealand Neptone Lyophilizied-Homogenized Mussels, 568 F. Supp. 1182 (N.D. Cal. 1983).

[17] 21 U.S.C.A. § 398(a).

[18] 21 U.S.C.A. § 399(a).

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35A Am. Jur. 2d Food § 51

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III. Enforcement of Regulations

A. In General

1. Overview

§ 51. Statutory authority for enforcement of food regulations—Reports; samples

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3, 12 to 16

Forms

Am. Jur. Pleading and Practice Forms, Food § 21 (Order—Granting claimant and Food and Drug Administration permission to withdraw samples of seized article for analysis)
Federal Procedural Forms § 31:220 (Motion—By owner of seized article of food—For leave to withdraw samples for analysis)
Federal Procedural Forms § 31:221 (Order—Granting claimant and FDA leave to withdraw samples of seized article for analysis)

Upon the completion of an inspection and prior to leaving, the inspector must provide the owner, operator, or agent in charge with a written report regarding any conditions or practices observed which indicate that any food in the establishment (1) consists in whole or part of any filthy, putrid, or decomposed substance; or (2) has been prepared, packed, or held under unsanitary conditions whereby it might have become contaminated or rendered injurious to health.[1]

If a sample is taken during the course of the inspection, the owner, operator, or agent in charge must be given a receipt describing the sample.[2] If the sample is later analyzed, the owner, operator, or agent in charge of the facility inspected must promptly be furnished with the results of that analysis.[3]

In the case of inspections other than for-cause inspections, the Secretary of Health and Human Services must review processes and standards applicable to inspections of domestic and foreign device establishments, and update such processes and standards through the adoption of uniform processes and standards, which provide for: exceptions to such processes and standards, as appropriate; announcing the inspection of the establishment within a reasonable time before such inspection

occurs; a reasonable estimate of the timeframe for the inspection, an opportunity for advance communications between the officers or employees carrying out the inspection; and regular communications during the inspection with the owner, operator, or agent in charge of the establishment regarding inspection status, which may be recorded by either party with advance notice and mutual consent.[4] Whenever a sample of a food is collected for analysis, any person named on the label of the article, or the owner thereof, may request to be provided a part of the official sample for the person's own examination or analysis.[5]

This statutory requirement is not merely directory for government officials but is mandatory for protection of the accused manufacturer, and compliance therewith is a condition precedent to prosecution of the accused.[6] Absent a formal request, it is not error for the government to fail to provide portions of the sample.[7]

A conviction for violating the food and drug laws will be overturned if the government, despite a seasonable request, fails to furnish a sample of the food tested and offers no reason for the failure.[8]

Footnotes

1 21 U.S.C.A. § 374(b).

2 21 U.S.C.A. § 374(c).

3 21 U.S.C.A. § 374(d).
As to furnishing part of the sample to the owner or producer, see § 51.

4 21 U.S.C.A. § 374(h).

5 21 U.S.C.A. § 372(b).

6 Triangle Candy Co. v. U.S., 144 F.2d 195, 155 A.L.R. 903 (C.C.A. 9th Cir. 1944).

7 U.S. v. Acri Wholesale Grocery Co., 409 F. Supp. 529 (S.D. Iowa 1976).

8 Triangle Candy Co. v. U.S., 144 F.2d 195, 155 A.L.R. 903 (C.C.A. 9th Cir. 1944).

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III. Enforcement of Regulations

A. In General

1. Overview

§ 52. Whistleblower protections for individuals reporting, testifying, or participating in investigation of suspected violation of standards

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3, 12 to 16

Under the whistleblower protections of the Food and Drug Administration (FDA) Food Safety Modernization Act,[1] whistleblower protections have been extended to workers who report, testify, or participate in the investigation of a suspected violation of FDA standards. Specifically, no entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee) (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the Act or any order, rule, regulation, standard, or ban under the Act, or any order, rule, regulation, standard, or ban under the Act; (2) testified or is about to testify in a proceeding concerning such violation; (3) assisted or participated or is about to assist or participate in such a proceeding; or (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of the Act, or any order, rule, regulation, standard, or ban under the Act.[2]

Moreover, any employee who believes that it has been discharged or otherwise discriminated against has 180 days to file a complaint with the Secretary of Labor, alleging such discharge or discrimination and identifying the person responsible. Upon receipt of such a complaint, the Secretary must notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person upon investigation.[3]

Under the FDA whistleblower protections, not later than 60 days after the date of receipt of a complaint and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the

Secretary must initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of the Secretary's findings.[4] If the Secretary of Labor concludes that there is reasonable cause to believe that a violation has occurred, the Secretary must issue findings with a preliminary order providing relief will be issued. Not later than 30 days after the date of notification of such findings and relief, the person alleged to have committed the violation or the complainant may file objections to the findings or the preliminary order or both, and request a hearing. Any such hearing must be conducted expeditiously; if a hearing is not requested within 30 days, the preliminary order will be deemed a final order that is not subject to judicial review.[5] The standards of proof are established by statute.[6] Not later than 120 days after the date of conclusion of any hearing, the Secretary must issue a final order providing the relief prescribed by statute, or denying the complaint.[7]

At any time before issuance of a final order, a whistleblower protection proceeding may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.[8] If the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring a nonjury action at law or equity for de novo review in the appropriate district court of the United States with jurisdiction, which has jurisdiction over such an action without regard to the amount in controversy.[9] The court has jurisdiction to grant all relief necessary to make the employee whole, including: injunctive relief and compensatory damages; reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination; back pay, with interest; compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.[10]

Federal regulations[11] establish procedures under the Food Safety Modernization Act (FSMA) for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf, including the submission of complaints,[12] investigations,[13] the issuance of findings and preliminary orders,[14] objections to findings and orders,[15] litigation before administrative law judges,[16] posthearing administrative review,[17] and the withdrawal of complaints and settlements.[18]

Footnotes

1 21 U.S.C.A. § 399d.

2 21 U.S.C.A. § 399d(a).

3 21 U.S.C.A. § 399d(b)(1).

4 21 U.S.C.A. § 399d(b)(2)(A).

5 21 U.S.C.A. § 399d(b)(2)(B).

6 21 U.S.C.A. § 399d(b)(2)(C).

7 21 U.S.C.A. § 399d(b)(3)(A).

8 21 U.S.C.A. § 399d(b)(3)(A).

9 21 U.S.C.A. § 399d(b)(4)(A).

10 21 U.S.C.A. § 399d(b)(4)(B).

11 29 C.F.R. §§ 1987.100 to 1987.115.

12 29 C.F.R. § 1987.103.

13 29 C.F.R. § 1987.104.

14 29 C.F.R. § 1987.105.

15 29 C.F.R. § 1987.106.

16 29 C.F.R. § 1987.109.

17 29 C.F.R. § 1987.110.

18 29 C.F.R. § 1987.111.

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§ 53. Other federal statutes related to enforcement of food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 3, 12 to 16

Treatises and Practice Aids

Federal Procedure, L. Ed. § 35:533 (Refusal or withdrawal of service—Fitness of applicant or recipient of service)
Federal Procedure, L. Ed. § 35:556 (Refusal or withdrawal of inspection service—Applicant found unfit)
Federal Procedure, L. Ed. § 35:566 (Seizure, condemnation, and disposition)
Federal Procedure, L. Ed. § 35:580 (Seizure of eggs)

The Federal Sanitary Food Transportation Act of 1990 provides for the establishment of procedures for transportation safety inspections for the purpose of identifying suspected incidents of contamination or adulteration of food.[1]

The Federal Perishable Agricultural Commodities Act[2] gives the Secretary of Agriculture authority to promulgate and enforce regulations concerning the quality and marketing of perishable commodities, such as fresh fruits and vegetables, in interstate commerce.[3] The Secretary is given the authority to enforce the regulations by injunction,[4] or by suspending or revoking the license to market perishable commodities.[5] For example, the Secretary may suspend the license of a shipper who has knowingly misbranded and shipped potatoes in violation of the Act.[6]

The Fair Packaging and Labeling Act[7] similarly confers authority on the Secretary of Health and Human Services to promulgate regulations designed to prevent the mislabeling of various consumer commodities, including food.[8] Commodities introduced or delivered for introduction into interstate commerce which are not packaged pursuant to the statute are deemed to be misbranded,[9] and the person responsible is subject in some instances to the penalties provided for the violation of the Food, Drug, and Cosmetic Act, which include monetary penalties and periods of imprisonment.[10]

The Poultry Products Inspection Act[11] which authorizes the Secretary of Agriculture to promulgate regulations prescribing the conditions under which poultry products to be used as human food are to be stored or otherwise handled to assure that such products will not be adulterated or misbranded when delivered to the consumer,[12] provides for monetary penalties and periods of imprisonment for those who violate the regulations.[13] The statute also provides for the withdrawal of inspection services for various offenses,[14] and the seizure and condemnation of poultry products which do not comply with the regulations and statutory requirements.[15]

Carriers are not subject to the penalties prescribed by reason of their receipt, carriage, holding, or delivery of poultry or poultry products, unless they have knowledge, or are in possession of facts which would lead a reasonable person to believe that the poultry does not comply with the regulations.[16]

Similarly, the Federal Meat Inspection Act[17] provides for the seizure and condemnation of meat or carcasses which are not in compliance with the Act's requirements,[18] and the refusal or withdrawal of federal inspection services for enumerated violations.[19]

Likewise, under the Egg Products Inspection Act,[20] violators of its provisions and the Secretary of Agriculture's regulations are subject to fines or imprisonment,[21] and eggs not in compliance with the regulations may be seized and condemned.[22]

The Food and Drug Administration (FDA) Food Safety Modernization Act[23] contains provisions concerning prevention of food safety problems, including provisions for: improving the capacity to detect and respond to food safety problems,[24] improving the safety of imported food,[25] the identification of programs and practices that are intended to promote the safety and supply chain security of food and to prevent outbreaks of foodborne illness and other food-related hazards that can be addressed through preventive activities,[26] concerning the creation of an integrated consortium of laboratory networks for responding to foodborne illnesses,[27] and, concerning the establishment of projects in coordination with the food industry to explore and evaluate methods to rapidly and effectively identify recipients of food to prevent or mitigate a foodborne illness outbreak.[28]

Footnotes

1 49 U.S.C.A. § 5701.

2 7 U.S.C.A. §§ 499a to 499s.

3 Magic Valley Potato Shippers, Inc. v. Secretary of Agr., 702 F.2d 840 (9th Cir. 1983).

4 7 U.S.C.A. § 499k.

5 7 U.S.C.A. § 499h.
The issuance of licenses is governed by 7 U.S.C.A. § 499d.
As to licensing as a mode of food quality regulation, see §§ 7, 11.

6 Magic Valley Potato Shippers, Inc. v. Secretary of Agr., 702 F.2d 840 (9th Cir. 1983).

7 15 U.S.C.A. §§ 1451 to 1461.

8 15 U.S.C.A. § 1454(a).

9 15 U.S.C.A. § 1456(a).

10 21 U.S.C.A. § 333.

11 21 U.S.C.A. §§ 451 to 472.

12 21 U.S.C.A. § 463(a).

13 21 U.S.C.A. § 461(a).

14 21 U.S.C.A. § 467.

15 21 U.S.C.A. § 467b(a).

16 21 U.S.C.A. § 461(b).

17 21 U.S.C.A. §§ 601 to 695.
As to the Meat Inspection Act, see § 32.

18 21 U.S.C.A. § 673.

19 21 U.S.C.A. § 671.

20 21 U.S.C.A. §§ 1031 to 1056.

21 21 U.S.C.A. § 1041.

22 21 U.S.C.A. § 1049.

23 21 U.S.C.A. §§ 2201 to 2252.

24 21 U.S.C.A. § 2221.

25 21 U.S.C.A. § 2241.

26 21 U.S.C.A. § 2204.

27 21 U.S.C.A. § 2222.

28 21 U.S.C.A. § 2223.

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A. In General

2. Penalties and Other Methods of Enforcement

§ 54. Penalties and other methods of enforcement of food regulations, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 16

Forms

Am. Jur. Pleading and Practice Forms, Food §§ 7, 8 (Complaint, petition, or declaration—For recovery of penalty—By state—Sale of adulterated food or beverage)

Food laws in their penal aspects are governed by the general rule of construction affecting all statutes; their scope therefore cannot be extended beyond the natural meaning of the words employed by the legislature.[1] Although this general rule that criminal statutes must be strictly construed to avoid the creation of penalties by construction applies, a reasonable view must be taken of the pure food statutes as will effectuate the manifest intent and purpose of the lawmakers in enacting them.[2]

The language of the statute must be examined to see whether, and when, cumulative penalties are permitted in proceedings based thereon; there is no right to recover such penalties, unless they are clearly authorized.[3]

A provision of the Federal Food, Drug, and Cosmetic Act (FDCA) imposing misdemeanor criminal penalties for the introduction of adulterated food into interstate commerce with an intent to defraud and mislead was not facially vague in violation of due process. While the offense did not contain a scienter requirement, the FDCA provided numerous definitions of adulteration and misbranding, regulation of food, drugs, and cosmetics pursuant to FDCA-imposed criminal sanctions as a means of regulating activities so dangerous to the public welfare as not to permit of exception for good faith and ignorance, and due process was not violated merely because mens rea was not a required element of the crime.[4]

When the Food and Drug Administration decides to utilize its criminal enforcement option under the Food, Drug, and Cosmetic Act,[5] it need not abandon its civil enforcement responsibilities; thus, the Food and Drug Administration is not

prohibited from conducting any further agency surveillance, as allowed by statute,[6] pending the conclusion of related criminal proceedings.[7]

Footnotes

1 Commonwealth v. Boston White Cross Milk Co., 209 Mass. 30, 95 N.E. 85 (1911).
As to the construction of penal statutes, generally, see Am. Jur. 2d, Statutes § 185.

2 Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908).

3 Rubenstein & Son Produce v. State, 272 S.W.2d 613 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.

4 United States v. USPlabs, LLC, 338 F. Supp. 3d 547 (N.D. Tex. 2018), referencing 21 U.S.C.A. § 333(a)(2).

5 21 U.S.C.A. § 333.
As to enforcement under the Federal Food, Drug, and Cosmetic Act, generally, see § 50.
As to criminal responsibility and prosecutions, generally, see §§ 63 to 70.

6 21 U.S.C.A. § 374.
As to the warrantless inspections under the Act, see § 50.

7 U.S. v. Gel Spice Co., Inc., 773 F.2d 427 (2d Cir. 1985).

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III. Enforcement of Regulations

A. In General

2. Penalties and Other Methods of Enforcement

§ 55. Penalties and other methods of enforcement of food regulations under Food, Drug, and Cosmetic Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 16

Forms

Am. Jur. Legal Forms 2d § 120:6 (Compliance with food regulations)

The Food, Drug, and Cosmetic Act provides for both criminal and civil penalties to be imposed upon any person who engages in acts prohibited by the Act.[1] The Food Quality Protection Act of 1996, which amended a number of provisions of the Food, Drug, and Cosmetic Act,[2] sets forth tolerances and exemptions for pesticide chemical residues in or on food[3] and provides that the penalties and sanctions set forth in Section 16 of the Toxic Substances Control Act[4] can be imposed upon persons who fail to comply with an order to conduct testing for pesticides on food items.[5]

Similarly, the Dietary Supplement Health and Education Act of 1994 amended various provisions of the Food Quality Protection Act of 1996,[6] including the provision concerning the misbranding of food;[7] a violation of that provision constitutes a prohibited act under the Food Quality Protection Act of 1996,[8] and gives rise to criminal penalties.[9]

Footnotes

[1] 21 U.S.C.A. § 333.

[2] 21 U.S.C.A. §§ 321, 331, 342, 346a.

[3] 21 U.S.C.A. § 346a(a).

[4] 15 U.S.C.A. § 2615.
As to criminal and civil penalties for violations of the Toxic Substances Control Act, see Am. Jur. 2d, Pollution Control §§ 1620 to 1622.

[5] 21 U.S.C.A. § 346a(p)(5)(D).

[6] 21 U.S.C.A. §§ 321, 331, 342, 343, 350.

[7] 21 U.S.C.A. § 343.

[8] 21 U.S.C.A. § 331.

[9] U.S. v. Strauss, 999 F.2d 692, 39 Fed. R. Evid. Serv. 720 (2d Cir. 1993).

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III. Enforcement of Regulations

A. In General

2. Penalties and Other Methods of Enforcement

§ 56. Penalties and other methods of enforcement of food regulations under Perishable Agricultural Commodities Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 16

The Perishable Agricultural Commodities Act[1] authorizes the Secretary of Agriculture to suspend or revoke the license of a commission merchant, dealer, or broker who violates the unfair conduct provision of the Act, or who is found guilty in a federal court of having violated the provision of the Perishable Agricultural Commodities Act governing the issuance of fraudulent inspection certificates.[2] The Perishable Agricultural Commodities Act also prohibits a licensee from employing any person, or any person who is or has been responsibly connected with any person whose license has been revoked or is currently suspended, as well as any such person who has been found to have violated the unfair conduct provision of the Act or against whom there is an unpaid reparation award issued within two years; the Secretary may suspend or revoke the license of any licensee who, after notice and an opportunity for a hearing, continues to employ any such person in violation of the foregoing provision.[3]

The Perishable Agricultural Commodities Act's restrictions against employing responsibly connected individuals do not require that a hearing be held to establish an individual's connection to a company with outstanding reparation orders before the individual's employment can be prohibited; if the record contains evidence that the individual was a partner, director, or officer in an offending company or held more than 10% of the company's stock, the individual's employment is restricted, and a licensee violates the Act by employing such person.[4] Courts must look beyond an individual's formal position within a company and consider the context surrounding the individual's position to evaluate whether that individual is in a position to control assets of Perishable Agricultural Commodities Act (PACA) trust and thus may be held personally liable for breach of fiduciary duty in failing to preserve PACA trust assets.[5]

Footnotes

[1] 7 U.S.C.A. §§ 499a to 499s.

[2] 7 U.S.C.A. § 499h(a), referring to 7 U.S.C.A. §§ 499b (unfair conduct) and 499n (issuance of fraudulent inspection certificates).
The Secretary of Agriculture may suspend or revoke a license of a commission merchant, dealer, or broker for altering inspection certificates for a fraudulent purpose regardless of whether the respondent has first been found guilty in a federal court of having violated the provision of the Act concerning the issuance of fraudulent inspection certificates. In re: D.W. PRODUCE, INC. PACA Docket No. D-94-555. Decision and Order filed October 7, 1994. 53 Agric. Dec. 1672, 1994 WL 643691 (U.S.D.A.).
That the Perishable Agricultural Commodities Act makes the forging of a certificate of produce inspection a crime does not preclude the Secretary of Agriculture from revoking a produce dealer's license for a violation of the Perishable Agricultural Commodities Act provision prohibiting the making of false or misleading statements in any transaction governed by that Act. Produce Place v. U.S. Dept. of Agriculture, 91 F.3d 173 (D.C. Cir. 1996).
The Secretary of Agriculture's conclusion that the plaintiff's violations of Perishable Agricultural Commodities Act were "flagrant" was not arbitrary, capricious, or an abuse of discretion, when the conduct in question was intentional, deliberate, and knowing and involved a large volume of produce and shipments that spanned a period of six weeks. Potato Sales Co., Inc. v. Department of Agriculture, 92 F.3d 800 (9th Cir. 1996).

[3] 7 U.S.C.A. § 499h(b).

[4] Conforti v. U.S., 74 F.3d 838 (8th Cir. 1996).

[5] Midwest Marketing Company, Inc. v. Quality Produce Suppliers, Inc., 6 F. Supp. 3d 843 (N.D. Ill. 2013), clarified on denial of reconsideration, 2014 WL 1052079 (N.D. Ill. 2014).

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III. Enforcement of Regulations

A. In General

2. Penalties and Other Methods of Enforcement

§ 57. Penalties and other methods of enforcement of food regulations under other federal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 16

The Federal Meat Inspection Act provides that the Secretary of Agriculture may refuse to provide, or may withdraw, meat inspection services with respect to any establishment if the Secretary determines, after an opportunity for a hearing is accorded to the applicant for, or recipient of, such services, that the applicant or recipient is unfit to engage in any business requiring inspections under the Act. Such a withdrawal or refusal of inspection services may be implemented where the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted in any federal or state court of any felony, or more than one violation of the law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome food or based upon fraud in connection with transactions in food.[1] Similarly, under the Egg Products Inspection Act,[2] the Secretary of Agriculture may refuse or withdraw egg inspection services.[3]

Footnotes

1 21 U.S.C.A. § 671.
As to the Meat Inspection Act, generally, see § 32.

2 21 U.S.C.A. §§ 1031 to 1056.

3 21 U.S.C.A. § 1047.

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III. Enforcement of Regulations

A. In General

2. Penalties and Other Methods of Enforcement

§ 58. Enforcement of food regulations by states

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 16

Forms

Am. Jur. Pleading and Practice Forms, Food § 7 (Complaint, petition, or declaration—For recovery of penalty—By state—Against food retailer—Sale of adulterated food)

A federal court has no jurisdiction to enjoin a state food commissioner from enforcing a pure food statute of the state by a criminal prosecution, as is required by statute, on the ground that the commissioner has erroneously construed the statute to include matters not within it.[1] However, a federal action to enjoin a state pure food commissioner from doing certain acts under cover of the commissioner's office, alleged to be injurious to the reputation of the plaintiff as a manufacturer of food products, is not a suit against a state within the Eleventh Amendment to the Federal Constitution, so as to deprive the federal courts of jurisdiction.[2] The enforcement of an order by an administrative officer in excess of the power conferred upon the officer by statute will be restrained by injunction.[3]

Under the Federal Food, Drug, and Cosmetic Act a state may bring proceedings in its own name for the civil enforcement, or to restrain violations, of specified provisions of the Act, if the food that is the subject of the proceedings is located in the state.[4] However, no such proceeding may be commenced before 30 days after the state has given notice to the Secretary of Health and Human Services of its intent to bring a proceeding, or before 90 days after such notice has been given if the Secretary has commenced a formal or informal enforcement action within 30 days after receiving the notice from the state; moreover, no proceeding may be commenced by a state if the Secretary is diligently prosecuting a proceeding pertaining to the food in question, has settled such a proceeding, or has settled an informal or formal enforcement action pertaining to such food.[5]

A plaintiff may not simply dress up a generic state law claim of wrongful conduct to prosecute conduct that is wrong only because it happens to violate the federal law requirements of the Federal Food, Drug, and Cosmetic Act.[6]

Footnotes

1 Arbuckle v. Blackburn, 113 F. 616 (C.C.A. 6th Cir. 1902).

2 Scully v. Bird, 209 U.S. 481, 28 S. Ct. 597, 52 L. Ed. 899 (1908).
As to the prohibition of federal court jurisdiction over actions brought against a state without its consent, see Am. Jur. 2d, States, Territories, and Dependencies § 106.

3 Waite v. Macy, 246 U.S. 606, 38 S. Ct. 395, 62 L. Ed. 892 (1918).

4 21 U.S.C.A. § 337(b)(1).

5 21 U.S.C.A. § 337(b)(2).

6 Patane v. Nestle Waters North America, Inc., 369 F. Supp. 3d 382 (D. Conn. 2019), referencing 21 U.S.C.A. § 337(a).

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III. Enforcement of Regulations

B. Seizures and Condemnation

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Food 24(1) to 24(3)

A.L.R. Library

A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
West's A.L.R. Digest, Food 24(1) to 24(3)

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35A Am. Jur. 2d Food § 59

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III. Enforcement of Regulations

B. Seizures and Condemnation

§ 59. Seizures and forfeitures related to enforcement of food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 24(1)

Trial Strategy

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Forms

Am. Jur. Pleading and Practice Forms, Food § 11 (Complaint in federal court—By United States of America—For seizure and condemnation of articles of adulterated food)
Am. Jur. Pleading and Practice Forms, Food § 15 (Complaint, petition, or declaration—In state court—By state—For seizure of articles of misbranded food)
Federal Procedural Forms § 31:214 (Complaint—By United States—For seizure and condemnation of articles of adulterated food)
Federal Procedural Forms § 31:215 (Claim—By owner of seized article of food)

The Federal Food, Drug, and Cosmetic Act[1] provides for the seizure of adulterated or misbranded articles of food when introduced into, or while in, interstate commerce, as well as while such articles are held for sale after their shipment in interstate commerce.[2] This statutory provision is intended to keep adulterated articles of food out of the channels of interstate commerce.[3]

The government is authorized to seize such foods before proving the justification for their seizure, since adequate provision is

made by the statute for a hearing before the condemnation of the goods seized.[4]

The right to seize and destroy unfit, unwholesome, or impure foods or foods manufactured or offered for sale in violation of a state statute or ordinance is based on the right and duty of the state to protect and guard, as far as possible, its citizens against injury from the use of foods that are not fit to be eaten.[5]

The Food and Drug Administration's (FDA) forfeiture action against fitness products with 1,3-dimethylamylamine (DMAA) did not violate the manufacturer's due process rights, where the governing statute provided notice that unapproved food additives were subject to forfeiture and was not unconstitutionally vague, and where the forfeiture proceeding afforded the full range of procedural due process available in a federal court. Moreover, the FDA was not required to engage in rulemaking on artificially produced DMAA for use in fitness products aimed at bodybuilders and other athletes, but could elect to proceed through a forfeiture action against the products as adulterated food additives.[6]

Footnotes

1 21 U.S.C.A. §§ 301 to 399i.

2 21 U.S.C.A. § 334.
Congress may, under its power to regulate interstate commerce, authorize the confiscation of an adulterated food product shipped in interstate commerce, after it has reached its destination and while it remains in the original and unbroken package in the possession of the consignee. Hipolite Egg Co. v. U.S., 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911).
As to the seizure of meat under the Federal Meat Inspection Act, see Federal Procedure, L. Ed. §§ 35:538 to 35:541.
As to the seizure of egg products under the Federal Egg Products Inspection Act, see Federal Procedure, L. Ed. § 35:580.

3 U.S. v. 7 Barrels, etc., of Spray Dried Whole Egg, 141 F.2d 767 (C.C.A. 7th Cir. 1944); U.S. v. 38 Cases, Containing Figlia Mia Brand, 99 F. Supp. 460 (S.D. N.Y. 1951).
By setting up a procedure for the immediate removal of the suspected articles from the flow of interstate commerce, Congress acted for the protection of the public against the consumption of impure, adulterated, or misbranded articles. U.S. v. 935 Cases More or Less, Each Containing 6 No. 10 Cans Tomato Puree, 136 F.2d 523 (C.C.A. 6th Cir. 1943).

4 U.S. v. 935 Cases More or Less, Each Containing 6 No. 10 Cans Tomato Puree, 136 F.2d 523 (C.C.A. 6th Cir. 1943).
An illegal seizure does not immunize goods from forfeiture. U.S. v. An Article of Device Theramatic, 715 F.2d 1339 (9th Cir. 1983).
As to condemnation of goods under federal statutes, see § 59.
As to inspections of food production facilities, see § 65.

5 Rubenstein & Son Produce v. State, 272 S.W.2d 613 (Tex. Civ. App. Dallas 1954), writ refused n.r.e.
As to the destruction or other disposition of condemned food, see § 61.

6 United States v. Undetermined Quantities of All Articles of Finished and In-Process Foods, 936 F.3d 1341 (11th Cir. 2019), cert. denied, 2020 WL 6121597 (U.S. 2020), referencing 21 U.S.C.A. § 334.

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B. Seizures and Condemnation

§ 60. Condemnation proceedings related to enforcement of food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 24(2.1), 24(3)

Trial Strategy

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Forms

Am. Jur. Pleading and Practice Forms, Food § 18 (Motion—By owner of seized article of food, drug, or cosmetic—To transfer action to different district)
Federal Procedural Forms § 31:214 (Complaint—By United States—For seizure and condemnation of articles of adulterated food, drugs, or cosmetics)
Federal Procedural Forms § 31:217 (Motion—By owner of seized article of food, drug, or cosmetic—To transfer action to different district)

Under the Federal Food, Drug, and Cosmetic Act,[1] adulterated or misbranded articles of food introduced into, or while in, interstate commerce or while held for sale after shipment in interstate commerce may be proceeded against by means of a libel, for condemnation, instituted in any federal district court within the jurisdiction of which the article is found.[2]

No libel for a condemnation proceeding may be instituted for an alleged misbranding if there is pending in any court such a proceeding based upon the same alleged misbranding; moreover, not more than one such proceeding may be instituted, except when the misbranding has been the basis of a prior judgment in favor of the United States in a criminal, injunction, or

libel for condemnation proceeding, or when the Secretary of Health and Human Services has probable cause to believe from facts found without a hearing that the misbranded article is dangerous or fraudulently misleading.[3] Additionally, when the number of libel for condemnation proceedings is limited by the statutory provision, the proceeding pending or instituted will be removed on the application of the claimant for trial to any district agreed upon by stipulation of the parties.[4] If there is a failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure was made for the removal of the action; after giving reasonable notice and opportunity to be heard to the United States Attorney for the district, unless good cause to the contrary is shown, the court will order that the case be removed to a district within reasonable proximity to the claimant's principal place of business.[5]

The procedure in cases of libel for condemnation of adulterated or misbranded articles of food must conform, as nearly as possible, to the procedure in admiralty, except that on the demand of either party any issue of fact in such a case must be tried by a jury.[6]

The Federal Meat Inspection Act[7] and the Federal Poultry Products Inspection Act[8] also provide for the condemnation of meat and poultry food products, respectively, which do not conform to the regulations governing the quality of those articles.

Footnotes

1 21 U.S.C.A. §§ 301 to 399i.

2 21 U.S.C.A. § 334(a)(1).
Adulterated shrimp, which were admitted into the United States and which the claimant had conditionally sold to a buyer, were admitted into interstate commerce and held for sale after their shipment into interstate commerce, as required for the condemnation of the shrimp under the Act. U.S. v. 302 Cases, 321 Cases, and 420 Cases, More or Less of Frozen Shrimp, Currently Located at Americold Corp., 25 F. Supp. 2d 1352 (M.D. Fla. 1998).
A condemnation proceeding, being a proceeding in rem against specific property, is local in character and must be brought where the property is subject to seizure under the process of the court. Clinton Foods v. U.S., 188 F.2d 289 (4th Cir. 1951).

3 21 U.S.C.A. § 334(a)(1).

4 21 U.S.C.A. § 334(a)(1).

5 21 U.S.C.A. § 334(a)(1).
As to change of venue in the federal district courts, generally, see Am. Jur. 2d, Federal Courts § 1136.

6 21 U.S.C.A. § 334(b).
As to practice and procedure in admiralty, generally, see Am. Jur. 2d, Admiralty §§ 115 to 210.

7 21 U.S.C.A. § 673(a).
As to the condemnation of meat and meat products, see Federal Procedure, L. Ed. §§ 35:538 to 35:541.

8 21 U.S.C.A. § 467b(a).
As to the condemnation of poultry products, see Federal Procedure, L. Ed. § 35:566.

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III. Enforcement of Regulations

B. Seizures and Condemnation

§ 61. Condemnation proceedings related to enforcement of food regulations—Disposition of condemned goods

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 24(2.1), 24(3)

Trial Strategy

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Under the Federal Food, Drug, and Cosmetic Act any food that has been condemned may be disposed of by destruction or sale, as the court may direct. If such food is sold, the proceeds, less the legal costs and expenses, are paid into the Treasury of the United States.[1]

After the entry of a decree in a condemnation proceeding, and upon the payment of the costs of the proceeding and the execution of a sufficient bond conditioned that the article will not be disposed of contrary to law, the condemned food may be released to the claimant for destruction or to be brought into compliance with the requirements of the Food, Drug, and Cosmetic Act under supervision of the government.[2]

When a condemned article is released to the claimant to be brought into compliance, the claimant may act only under government supervision; if that supervision is not forthcoming, the claimant may not act on its own, but must obtain an order from the court requiring the authorities to perform their supervisory function.[3]

If a condemned food was imported into the United States and the person seeking its release establishes that the adulteration, misbranding, or other violation did not occur after the food was imported, and also establishes that there was no cause for the person to believe the food was adulterated, misbranded, or otherwise in violation before it was released from customs custody, the court may permit the article to be delivered to the owner for exportation in lieu of destruction.[4]

However, it must also be shown that all of the requirements the provision of the Food, Drug, and Cosmetic Act governing the quality and branding of exported food are met.[5]

Footnotes

1 21 U.S.C.A. § 334(d).
As to the disposition of condemned foods, generally, see Federal Procedure, L. Ed. § 35:466.

2 21 U.S.C.A. § 334(d).
It is wholly within the discretion of the trial court whether the reprocessing of a condemned article of food is to be allowed. 338 Cartons, More or Less, of Butter v. U.S., 165 F.2d 728 (C.C.A. 4th Cir. 1947).
As to costs of condemnation proceedings, see § 62.
As to decrees in food condemnation proceedings, see Federal Procedure, L. Ed. § 35:465.

3 Fresh Grown Preserve Corp. v. U.S., 143 F.2d 191 (C.C.A. 6th Cir. 1944).

4 21 U.S.C.A. § 334(d).

5 21 U.S.C.A. § 334(d).

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B. Seizures and Condemnation

§ 62. Condemnation proceedings related to enforcement of food regulations—Costs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 24(2.1), 24(3)

Trial Strategy

Food Seizure Litigation, 9 Am. Jur. Trials 59

When a decree of condemnation is entered against an article of food, court costs and fees, storage, and other expenses must be awarded against the person, if any, intervening as the claimant of the article,[1] although an unsuccessful claimant is not liable for the fees and expenses for witnesses whose testimony was unnecessary for the libelant's case.[2]

The expenses of presenting proof at trial are not recoverable as costs.[3]

While an award of costs under the statute is made at the time a decree of condemnation is entered, there is no requirement that a person against whom costs are awarded still be a party to the proceeding at the time the decree is entered; such an award is required by the statute even if the claimant attempts to withdraw prior to the issuance of the decree.[4]

Footnotes

1 21 U.S.C.A. § 334(e).

2 Atlantic Coast Line R. Co. v. Finn, 195 F. 685 (C.C.A. 4th Cir. 1912).
As to costs in a food condemnation proceeding, see Federal Procedure, L. Ed. § 35:468.

[3] U.S. v. Article of Drug, 428 F. Supp. 278 (E.D. Tenn. 1976).

[4] U.S. v. Articles of Drug. . . Penapar VK. . ., 458 F. Supp. 687 (D. Md. 1978).

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IV. Criminal Responsibility and Prosecutions

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Food 18 to 23

A.L.R. Library

A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
A.L.R. Index, Food
A.L.R. Index, Food and Drug Administration (FDA)
West's A.L.R. Digest, Food 18 to 23

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IV. Criminal Responsibility and Prosecutions

A. In General

§ 63. Criminal responsibility and prosecutions related to food regulations, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 18 to 23

A provision of the Federal Food, Drug, and Cosmetic Act imposes criminal liability for a violation of the prohibitions contained in that Act.[1]

A person who forges, counterfeits, simulates, or falsely represents, or without proper authority uses any mark, stamp, tag, label, or identification devices authorized or required by the regulations for seafood is guilty of a misdemeanor and subject to the term of imprisonment and fines specified by the statute.[2]

The Perishable Agricultural Commodities Act makes the forging of certificates of produce inspection a crime.[3]

Footnotes

1 21 U.S.C.A. § 333(a).
The Food and Drug Administration is not required to prosecute every adulterated food violation nor to announce at the outset whether it wishes to proceed criminally or civilly. U.S. v. Thriftimart, Inc., 429 F.2d 1006, 18 A.L.R. Fed. 726 (9th Cir. 1970).

2 21 U.S.C.A. § 376.

3 7 U.S.C.A. § 499n(b).

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IV. Criminal Responsibility and Prosecutions

A. In General

§ 64. Persons liable for criminal prosecution related to food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 18

Under many statutes, the sale of articles of food in violation of a statute by an agent or servant renders the employer liable, even though the employer did not know of, or consent to, the sale,[1] and even though the violation occurs during the employer's absence and contrary to the employer's instructions.[2]

A corporation will held liable for violations of food regulations.[3] For example, a company's products included food within the meaning of the Food, Drug, and Cosmetic Act (FDCA), as required to support the government's action for violation of the FDCA adulterated foods provision, where the company admitted in its responsive pleadings that some of its products constituted food.[4]

Moreover, corporate officers may be found liable for such violations as the shipping of misbranded or adulterated food by their corporation.[5] Proof of the personal participation of an individual officer is not required to establish the officer's guilt, if the officer is a person responsible for the operation of the business out of which the violation grows.[6] Thus, strict liability may be imposed upon a corporate officer who has a responsible relationship to corporate wrongdoing under the Federal Food, Drug, and Cosmetics Act.[7] For example, when the president of a company which imported, processed and packaged spices was principally responsible for plant sanitation, and he decided what methods of sanitation were to be used and controlled the hiring and firing of outside exterminators, he was in a position of responsibility and authority to control insanitary conditions, thereby supporting his convictions for the company's violations of the Federal Food, Drug, and Cosmetic Act for allowing food to become "adulterated."[8]

Under the "responsible corporate officer" (RCO) doctrine, a corporate agent, through whose act, default, or omission the corporation committed a crime in violation of the Food, Drug, and Cosmetic Act, may be held criminally liable for the wrongdoing of the corporation whether or not the crime required consciousness of wrongdoing by the agent.[9]

Footnotes

[1] Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908); Com. v. Jackson, 345 Pa. 456, 28 A.2d 894 (1942).
The act of the driver and salesman of a wholesale milk dealer in selling milk and cream below the lawful price must be charged to their employer. People, on Complaint of McDonough, v. Bratowsky, 154 Misc. 432, 276 N.Y.S. 418 (Magis. Ct. 1934).

[2] Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908).
When a statute provides that no one may sell food which is adulterated or below a standard quality, that a sale of the prohibited article is made by an employee or agent of the person accused does not free the latter from liability for the violation of the act. Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908).

[3] State v. Belle Springs Creamery Co., 83 Kan. 389, 111 P. 474 (1910).
A corporation is within the meaning of the word "whoever" in a statute providing that "whoever, by himself, or by his agent or servant" sells adulterated milk should be punished. Commonwealth v. Graustein & Co., 209 Mass. 38, 95 N.E. 97 (1911).

[4] U.S. v. American Mercantile Corp., 889 F. Supp. 2d 1058 (W.D. Tenn. 2012), subsequent determination, 2012 WL 5457355 (W.D. Tenn. 2012).

[5] U.S. v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).

[6] U.S. v. Diamond State Poultry Co., 125 F. Supp. 617 (D. Del. 1954).
As to the defense that a corporate officer was powerless to prevent a violation, see § 66.

[7] U.S. v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975); Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991).

[8] U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1205 (E.D. N.Y. 1984).

[9] Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012).

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IV. Criminal Responsibility and Prosecutions

A. In General

§ 65. Intent as element of criminal offense related to food regulations

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West's Key Number Digest

West's Key Number Digest, Food 18

The distribution of impure or adulterated food for consumption is an act perilous to human life and health and, in the absence of a contrary statutory provision, is not made innocent and harmless by the want of knowledge or by the good faith of the seller; under some statutes, it is the dangerous act itself that determines the guilt, regardless of the intent of the defendant.[1] Thus, under a statute making it a criminal offense for any person to manufacture, sell, or offer for sale any article of food if it contains any added poisonous or other deleterious ingredient which renders the article injurious to health, neither knowledge of the contamination nor negligence in fact is a material element of the offense.[2]

Likewise, to condemn a food product under the Federal Food, Drug, and Cosmetic Act, it is not necessary to show that anyone was actually misled or deceived by the food article, or that there was an intent on the part of the manufacturer to deceive.[3] An article may be misbranded pursuant to the misdemeanor misbranding provision of the Food, Drug, and Cosmetic Act (FDCA) without any conscious fraud at all, thus creating a form of strict criminal liability;[4] however, felony liability for misbranding under the FDCA requires an additional mens rea element of intent to defraud or mislead that is absent from the broader-reaching misdemeanor provision of the Act.[5] The Act could not be enforced if the government were compelled to establish a wrongful intent on the part of those who ship prohibited articles in interstate commerce; all that needs to be shown to justify condemnation of the article of food is that the adulterated article of food was transported in interstate commerce.[6] However, the criminal penalty which is imposed for a violation of the Act is more severe when the defendant committees the violation with the intent to defraud or mislead.[7]

The provision of the Food, Drug, and Cosmetic Act which prohibits food from being held in unsanitary conditions where it may become contaminated[8] dispenses with the conventional requirement for criminal conduct that there be an awareness of wrongdoing.[9] The lack of mens rea is not a defense to a violation for which the Food, Drug, and Cosmetic Act imposes strict liability.[10] For example, misdemeanor convictions of two defendants, as owners and operators of an egg production company, for the offense of introducing into interstate commerce eggs that had been adulterated with salmonella enteritidis, was based on their negligence rather than vicarious liability, and thus, the convictions did not violate substantive due process, though the statute did not have a mens rea requirement. The defendants knew or should have known about the risks presented by the insanitary conditions at company's egg barns, and about the proper preventative and remedial measures that they should have

taken in response.[11]

The Food, Drug, and Cosmetic Act states that no person is subject to the penalties prescribed by statute for having received any article of food in interstate commerce and delivered it or proffered delivery of it in good faith, unless the person refuses to furnish on request the name and address of the person from whom the article was purchased or received, as well as copies of any documents pertaining to the delivery of the article.[12]

A showing of a specific intent is required under other statutes, such as the provision of the Federal Meat Inspection Act[13] relating to fraudulent sales of misbranded meat.[14]

When a statute or ordinance makes it a crime to possess an adulterated food, with the intent to sell it, the requisite intent must be shown.[15] The intent to sell a prohibited article may be inferred.[16]

Evidence about actions that federal and state agencies took in response to a salmonella outbreak was not inadmissible as evidence of subsequent remedial measures, in a prosecution for introduction of adulterated food into interstate commerce with the intent to defraud or mislead, where the defendant claimed that he intended to introduce such evidence not to demonstrate the Government's negligence or culpable conduct, but rather to show the absence of industry standards at the time of alleged offenses, which was pertinent to whether the defendant had an intent to defraud.[17]

Footnotes

1 State v. Yanizyn, 120 Vt. 366, 141 A.2d 423 (1958); State v. Welch, 145 Wis. 86, 129 N.W. 656 (1911).
Under many statutes enacted for the protection of the public health and safety, for example, food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. People v. Vaughn, 230 Cal. App. 4th 322, 178 Cal. Rptr. 3d 595 (1st Dist. 2014).

2 Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641, 127 A.L.R. 1185 (1940).

3 U.S. v. An Article of Food. . . "Manischewitz. . . Diet Thins'', 377 F. Supp. 746 (E.D. N.Y. 1974).

4 U.S. v. Watkins, 278 F.3d 961 (9th Cir. 2002).

5 U.S. v. Watkins, 278 F.3d 961 (9th Cir. 2002).

6 U. S. v. Two Bags, Each Containing 110 Pounds, Poppy Seeds, 147 F.2d 123 (C.C.A. 6th Cir. 1945).
As to condemnation of adulterated food under federal statutes, see § 64.

7 21 U.S.C.A. § 333(a)(2).
The intent to defraud or mislead language in the statute increasing the potential penalty for violations of the Act encompasses both fraud on the ultimate consumer and fraud on government enforcement agencies. U.S. v. Cambra, 933 F.2d 752 (9th Cir. 1991).
"Intent to mislead" within meaning of felony misbranding provision of the Food, Drug, and Cosmetic Act (FDCA) is not established by showing mere knowledge of a statement's falsity by its maker; it requires proof of materiality; that is, regardless of any additional liability Congress intended to include with this language, one still cannot intend to mislead another by means of a misrepresentation without having an expectation that the recipient would actually or reasonably rely on it. U.S. v. Watkins, 278 F.3d 961 (9th Cir. 2002).

8 21 U.S.C.A. § 331(k).

9 U. S. v. J. Treffiletti & Sons, 496 F. Supp. 53 (N.D. N.Y. 1980).

10 U.S. v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975); U.S. v. Ballistrea, 101 F.3d 827 (2d Cir. 1996).
As to mens rea, generally, see Am. Jur. 2d, Criminal Law § 112.

11 United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016).

12 21 U.S.C.A. § 333(c)(1), discussed in § 66.

13 21 U.S.C.A. § 676(a).

14 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).

15 People v. Timmerman, 79 A.D. 565, 80 N.Y.S. 285 (1st Dep't 1903), aff'd, 179 N.Y. 550, 71 N.E. 1136 (1904).

16 State v. Dunbar, 13 Or. 591, 11 P. 298 (1886).
An allegation that the defendants delivered adulterated milk to a purchaser who they knew or intended would subsequently introduce the milk into the interstate market was sufficient to justify the exercise of federal jurisdiction in a criminal prosecution for the introduction or delivery for introduction of adulterated milk into interstate commerce. U.S. v. Vidal-Cruz, 67 F. Supp. 2d 35 (D.P.R. 1999).

17 U.S. v. Parnell, 32 F. Supp. 3d 1300, 94 Fed. R. Evid. Serv. 1254 (M.D. Ga. 2014).

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IV. Criminal Responsibility and Prosecutions

A. In General

§ 66. Defenses to criminal offense related to food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 18

The Federal Food, Drug, and Cosmetic Act provides that no person is subject to the penalties prescribed by the statute for having received any article of food in interstate commerce and delivered it or proffered the delivery of it in good faith, unless the person refuses to furnish on request the name and address of the person from whom the article was purchased or received, as well as copies of any documents pertaining to the delivery of the article;[1] nor can a person be prosecuted for violating the specified statutory provisions prohibiting the shipping of adulterated or misbranded goods, or goods that may not be introduced into interstate commerce, when the person holds a guaranty from the person from whom the person received the goods that they are not adulterated or misbranded or impermissibly introduced into interstate commerce.[2]

The duty imposed by Congress on responsible corporate agents involved in the distribution of food requires the highest standard of foresight and vigilance. However, the criminal penalty provisions of the Food, Drug, and Cosmetic Act do not require that which is objectively impossible, and corporate agents held criminally accountable for causing violations of the Act may claim as a defense that they were powerless to prevent or correct the violation.[3]

The impossibility of compliance with the Food, Drug, and Cosmetic Act or the claim that the processor did the best it could under the circumstances are not valid defenses to a proceeding to condemn food because it was processed under insanitary conditions.[4]

A carrier is not subject to the penalties prescribed under the Poultry Products Inspection Act by reason of their receipt, carriage, holding, or delivery of poultry or poultry products, unless it has knowledge, or is in possession of facts which would lead a reasonable person to believe that the poultry does not comply with the regulations.[5]

Footnotes

[1] 21 U.S.C.A. § 333(c)(1).

[2] 21 U.S.C.A. § 333(c)(2).

[3] U.S. v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975).
As to the liability of corporate officers for violations by their companies, generally, see § 64.

[4] U.S. v. 1,200 Cans Pasteurized Whole Eggs by Frigid Food Products, Inc.—Detroit, Mich., 339 F. Supp. 131 (N.D. Ga. 1972).
The claim of consumers under California's Safe Drinking Water and Toxic Enforcement Act's warning requirements against a manufacturer of soft drinks that contained an additive that was a known carcinogen was not impliedly preempted, where it was not impossible for the manufacturer to comply with the Food and Drug Administration (FDA)'s labeling regulation allowing the use of the term "caramel color" while at the same time including the statutory warning. Sciortino v. Pepsico, Inc., 108 F. Supp. 3d 780 (N.D. Cal. 2015) (applying, in part, California law).
As to condemnation of adulterated food under federal statutes, generally, see § 64.
As to condemnation without regard to the intent of the violator, see § 65.

[5] 21 U.S.C.A. § 461(b).

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A.L.R. Index, Food, Drug, and Cosmetic Act (FDCA)
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B. Procedure

§ 67. Violations of food act regulations as petty offenses; jury trial considerations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 22

In general, violations of food acts are among those offenses classified as petty offenses, and there is thus no rule of public policy requiring a jury trial in those cases.[1]

However, under some statutes, a defendant charged with a criminal violation of a food safety law is entitled to a jury trial.[2]

Footnotes

1 Schick v. U.S., 195 U.S. 65, 24 S. Ct. 826, 49 L. Ed. 99 (1904).
Prosecutions for violations of municipal food ordinances are generally without a jury. Miller v. City of Birmingham, 151 Ala. 469, 44 So. 388 (1907).

2 U.S. v. Jorgensen, 144 F.3d 550 (8th Cir. 1998) (the defendants were charged with a violation of the Federal Meat Inspection Act).
As to the right to a jury trial in criminal prosecutions, generally, see Am. Jur. 2d, Criminal Law §§ 952 to 958.

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§ 68. Notice to defendant required under federal food statutory provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 18

Treatises and Practice Aids

Federal Procedure, L. Ed. §§ 35:490 to 35:495 (Opportunity to present views before report of criminal violation)

Before a violation of the Federal Food, Drug, and Cosmetic Act is reported by the Secretary of the United States Department of Health and Human Services to an United States Attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated must be given the appropriate notice and opportunity to present the person's views, either orally or in writing, with regard to the contemplated proceedings.[1] However, this provision merely imposes an administrative requirement; the giving of an opportunity to a defendant to express the defendant's views is not a prerequisite to judicial prosecution.[2]

The regulations promulgated by the Food and Drug Administration provide that the notice and an opportunity to present views need not be provided if the Commissioner of the Food and Drug Administration (FDA) has reason to believe that the alteration or destruction of evidence or flight by the prospective defendant may result,[3] or if the Commissioner contemplates recommending further investigation by the Department of Justice.[4]

Footnotes

1 21 U.S.C.A. § 335.

2 U.S. v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).

[3] 21 C.F.R. § 7.84(a)(2).

[4] 21 C.F.R. § 7.84(a)(3).

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B. Procedure

§ 69. Operating under indictment or information in criminal actions related to food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 20(1) to 20(5)

A violation of the Federal Food, Drug, and Cosmetic Act,[1] for which the permissible penalty includes imprisonment for one year or less, may proceed under an indictment, information, or complaint under the applicable federal rule.[2] However, when the allowable term of imprisonment exceeds one year, as when the defendant was previously convicted of violating the Act or when the violation was committed with the intent to defraud or mislead,[3] the prosecution must be by indictment, unless the right to an indictment is waived by the defendant.[4]

An offense punishable by imprisonment for a term exceeding one year may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the defendant's rights, waives in open court the prosecution by an indictment.[5]

When intent is not an element of an offense under a food safety statute, the indictment or information for selling food in violation of the statute need not state the sale was fraudulently made, or that the seller knew the character of the article sold.[6]

Footnotes

1 21 U.S.C.A. § 333(a)(1).

2 Fed. R. Crim. P. 7(a)(2), referring to Fed. R. Crim. P. 58(b)(1).
As to criminal penalties for violations of food safety laws, generally, see §§ 63 to 70.
As to the use of an information or an indictment in food safety cases, see Federal Procedure, L. Ed. §§ 35:496, 35:497.

3 21 U.S.C.A. § 333(a)(2).

4 Fed. R. Crim. P. 7(b).

[5] Fed. R. Crim. P. 7(b).

[6] Fox v. State, 94 Md. 143, 50 A. 700 (1901); State v. Maurer, 255 Mo. 152, 164 S.W. 551 (1914).
An information charging the defendant in the language of the statute with willfully and unlawfully violating a pure food act by overreading a test of cream purchased by him for commercial purposes is not demurrable for failing to charge that the act was committed with the intent to defraud the seller, since such intent is not made an element of the offense by the statute. State v. Thorp, 94 Neb. 310, 143 N.W. 202 (1913).
As to intent as an element of a violation of a food safety statute, see § 65.

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B. Procedure

§ 70. Evidence and burden of proof in criminal prosecutions related to food regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Food 21

To secure a verdict for the condemnation of adulterated food under the Federal Food, Drug, and Cosmetic Act the government has the burden of proving the article is adulterated within the meaning of the statute.[1] However, to prove a violation of the section of the Act defining adulterated food, the government need only prove the food was held under unsanitary conditions which created a reasonable possibility of its contamination; proof of actual contamination is not required, although such proof is evidence that the food was held under unsanitary conditions.[2]

Under the de novo review language of the Federal Food, Drug, and Cosmetic Act's (FDCA) adulterated food provision, the government in an enforcement proceeding against an adulterated dietary supplement may rely on the Food and Drug Administration (FDA) Final Rule alone to satisfy its burden of proof to show adulteration, and thus need only show the existence of the Final Rule and its applicability; the de novo review clause does not require additional evidence if there is an applicable FDA Final Rule.[3]

The accused individual or company has the burden of proving affirmative defenses.[4] If a corporate officer asserts, as a defense to a criminal prosecution for the violation by the officer' company of a food safety law, that the officer was powerless to prevent a violation of the Act, the officer has the burden of coming forward with evidence in support of the asserted defense. However, the burden ultimately remains on the prosecution to prove the defendant's guilt beyond a reasonable doubt, including the defendant's power to prevent or correct the prohibited condition.[5]

Footnotes

[1] U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658 (1914); Hipolite Egg Co. v. U.S., 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911); NVE, Inc. v. Department of Health and Human Services, 436 F.3d 182 (3d Cir. 2006).

[2] U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1205 (E.D. N.Y. 1984).
The evidence is sufficient to support a conviction for the adulteration of candy by the manufacturer, when it is shown that the conditions at the manufacturing plant were unsanitary, involving the presence of rats and cockroaches, that the candy-making machines were left unclean after use, and that rodent hairs and pellets and insect larvae and fragments were present in the samples of the candy taken for analysis. Triangle Candy Co. v. U.S., 144 F.2d 195, 155 A.L.R. 903 (C.C.A. 9th Cir. 1944).

[3] Hi-Tech Pharmaceuticals, Inc. v. Crawford, 544 F.3d 1187 (11th Cir. 2008).

[4] U.S. v. New England Grocers Supply Co., 488 F. Supp. 230 (D. Mass. 1980).
If one is found in the possession of adulterated food under circumstances from which it may be inferred that the adulteration is recent, it is incumbent on him, in a prosecution therefor, to show the adulteration was without his knowledge. Isenhour v. State, 157 Ind. 517, 62 N.E. 40 (1901).
As to defenses to charges of food safety violations, see § 66.

[5] U.S. v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975).

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